UNIVERSITY OF ALBERTA

MODERN CHALLENGES TO MORAL RIGHTS PROTECTION UNDER COPYRIGHT LAW: THE WAY FORWARD

by

Poku Adusei

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Masters of Laws

Faculty of Law

Edmonton, Alberta
Spring, 2005

0-494-07972-X

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DEDICATION

This thesis is dedicated to –

my endurable octogenarian grandmother: **Obakoma Afua Awo Donkor** of Banko, Ashanti, and to the memory of the late **Col. (rtd) CHK Lodoh**, who passed away whilst marking the exams-scripts of the graduating class of the Ghana School of Law, 2003.

TO GOD BE THE GLORY!

ABSTRACT

This study aims at finding a better approach to moral rights protection in the internet age. To this end, it examines the moral rights protection regimes of some common law countries. It establishes that the moral rights protection is comparatively held in low esteem, especially in the common law world. To make matters worse, the internet has brought with it unprecedented threats to this already obscure aspect of copyright law. Attempts to find answers to those threats have also created more problems than solutions.

In suggesting the way out of these quagmires that confront moral rights protection, first, the paper contends that the moral rights of authors should be protected as fundamental human rights in order to ensure respect for creative endeavours. Second, the nature of the internet necessitates the adoption of international copyright principles to tackle problems confronting moral rights protection and enforcement. This can provide few answers to some of the numerous questions.

ACKNOWLEDGEMENT

I am grateful to a number of people for their support which led to the completion of this thesis. Their assistance and guidance helped get me through difficult times.

My thanks primarily go to my supervisor, Professor Wayne Renke, who spent considerable time from his busy work schedule on my thesis, and always provided me with his insightful comments and opinions. I am also indebted to Professor F.C. DeCoste for reading an earlier draft of this thesis and making constructive suggestions. Thanks also go to Professor Robert Chambers and Professor Tania Bubela for accepting to be members of my defence committee.

My profound appreciation goes to the financiers of the Hon. N.D. McDermid Graduate Scholarship and the Faculty of Law Annual Graduate Scholarships Fund for offering me the scholarship to pursue my study at the University of Alberta. Without this financial assistance, this research would not have been possible.

I am also thankful to all the staff of the Faculty of Law, especially Kim Wilson and Gregg Dearborn. My sincere thanks go to the staff of John A. Weir Memorial Library, in particular, Michael Storozuk, in helping me to locate library materials.

Most importantly, my heartfelt gratitude goes to my uncle Samuel Osei Nsiah and my mother Florence Achiaa for being an incredible driving force during my time in Ghana. Their support helped shape my academic view. But for the widower's might of the following people, my journey to Canada would have lasted for more than forty years on foot – Kojo Bentsi-Enchill, K.A. Wilson, Atta Akyea, Yonny Kulendi, Hon. Kofi Osei-Ameyaw, Hon. Yaw Baah, Ekow Baiden, George K. Sarpong, and Isaac Amofah.

Thank you all for making this dream come true.

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INTRODUCTION

A. AN OVERVIEW

Copyright law, among the various branches of intellectual property law[1], has been the subject of much discussion by legal scholars and commentators. Copyright law continues to have worldwide academic appeal because of the vast amount of intellectual property (IP) that falls under its jurisdiction, because it provides protection to the most widely available forms of IP objects, and because its reach is now universal. Copyright's tentacles extend to all kinds of intellectual creativity, including especially literary (such as computer programs and data bases), artistic, dramatic, and musical works. In fact, volumes of academic writing can be produced on each of these four main subjects of copyright protection without fear of exhausting it.[2]

Contemporary copyright legislation, especially in the common law world, has its roots in the English *Statute of Anne*, 1709[3], which gave the 'sole right and liberty of

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[1] Intellectual Property (IP) law generally covers Copyright, Patents, Trade-Marks, Industrial Design, Law of Confidentiality, Trade Secrets, Integrated Circuits, Plant Breeders Rights, and Unfair Competition Law. The broad scope of IP is confirmed in the *Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods* (Part II), signed by the Members of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), April 15, 1994 at Marrakesh, Morocco [hereinafter "the TRIPS Agreement"]. These other areas of intellectual property are beyond the scope of this paper. However, this discussion may apply *mutatis mutandis* to the other branches of IP law.

[2] Materials that receive protection as neighbouring rights and those classified as derivative works are excluded from the discussion and referred to briefly only where this is necessary to clarify issues.

[3] *Copyright Act*, 1709, 8 Anne, c. 21 (Title: "An Act for the Encouragement of Learning by vesting the

printing books' to authors and their assignees. Copyright legislation purports to ensure the legal recognition of the economic and moral rights of creators and to balance these rights against the needs of users. The level and scope of copyright protection is now much more extensive. Copyright laws of states have undergone significant changes to deal with technological advances, and whether these recent changes are desirable will be one of the preoccupations of the present study.

Copyright protects against unauthorised use or exploitation of other people's creative works. These works receive automatic statutory protection when an original idea or concept is expressed in tangible form. It is worth stressing that while laws respecting the substance and ownership of copyright have been harmonised to a considerable extent, there remain some key differences in the copyright protection regimes in different jurisdictions and these divergences will be highlighted in the course of the discussion.

Generally, copyright laws of states proceed from the premise that neither the creator of an original work of authorship nor the general public ought to be able to appropriate all of the benefits that flow from the work. Lord Mansfield, some two hundred years ago, described the tension as follows: "...we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for service of our community, may be deprived of their just merits, and the reward for their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded."[4] Stevens J. provided

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Copies of Printed Books in the Authors or Purchasers of such Copies during the Times herein mentioned").

[4] *Sayre v. Moore* (1785), 102 E.R. 139, at 140 (K.B.), Lord Mansfield C.J.

the contemporary American restatement of this social policy of copyright in *Sony Corporation v. Universal City Studios*: "the limited grant [of copyright protection] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors...by the provision of special reward, and to allow the public access to the product of their genius after the limited period of exclusive control has expired."[5] The Canadian version was offered by Binnie J. in *Theberge v. Galerie d'Art du Petit Champlian Inc.*: "The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)..."[6] Although copyright law protects both economic and moral rights of authors, these three judicial statements of the social policy understanding of copyright appear to lay emphasis on the economic interests of authors, and I will explore this emphasis and seek out the reasons for it.

A major purpose of this paper is to examine moral rights protection critically and to make suggestions for their proper protection and enforcement in the internet age.[7]

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[5] 464 US 417 (1984) at 429, Stevens J. See also *Feist Publications, Inc., v. Rural Telephone Service Co., Inc.* 111 S. Ct. 1282 at 1290 (1991) (U.S. S.C.), *per curiam*.

[6] 2002 SCC 34, at para. 30 (S.C.C.), per Binnie J.

[7] The digital world is vastly different from the print world within which our copyright laws originated. Some of the features are:

- it is possible to make an almost unlimited number of perfect reproductions,
- it is fast, easy and cheap to make these reproductions,

Throughout the discussion, the focus will be the statutory protection of moral rights of authors in three common law countries, namely, the United States, Canada, and the United Kingdom.[8] The US has been chosen as the major exporter and importer of copyrighted works, Canada as the place where I am pursuing this study, and the UK as the cradle of contemporary copyright law. Moral rights protections of these three countries, taken together, provide an indication of the trend respecting the approaches to moral rights recognition in the common law world.

The internet, as a new technology, has been hailed as the most revolutionary social development since the printing press.[9] Besides the challenges presented by the internet, no modern phenomenon better demonstrates the importance of free resources to innovation and creativity than the internet. Tuomi opines that "[t]he [i]nternet has brought with it many opportunities for those willing to embrace it and many challenges for those who are not."[10] This is particularly true for copyright law, the branch most severely affected by the blowing wind of the internet. The impact of the internet on copyright is both positive and negative. On the one hand, the internet offers enormous

---

- information can be transmitted instantaneously to an unlimited number of destinations,
- it is difficult to detect infringements and identify infringers, etc.

[8] Incidental reference may also be made to the civil law tradition to throw more light on the discussion. Moreover, for the sake of simplicity, reference to "copyright" in this paper includes moral rights as well.

[9] Jessica Litman, *Digital Copyright* (Amherst, New York: Prometheus Books, 2001), at 12 [Litman].

[10] W. Victor Tuomi, "Copyright, and the Internet: The Copyright Board Chimes In" (2001-2002) Vol.18(1) *Canadian Intellectual Property Review* 69-102, at 69.

opportunities through the dissemination of ideas and information, thereby adding additional value to the worth of copyrighted materials. On the other hand, the internet poses a herculean challenge to traditional principles of copyright, including moral rights, protection. Dratler, relying on McGeady[11], notes that "[t]he internet has become, for many, a free-speech forum that compares with the old Hyde Park free-speech forum in London as a jetliner to an ox cart."[12] It is sending shock waves through the legal community because of its tendency to unsettle traditional copyright concepts.

In response to the challenges presented by the internet, two World Intellectual Property Organisation Treaties[13] were adopted in December, 1996 to allow states to provide legal blessing to a system that allows answers to the machine to be sought from the machine – the institution of a system that allows authors to erect their own fences (via encryption-based technology) to prevent access to or use of works. Mackaay observes that technological blocking measures can be compared to fences protecting real

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[11] Steven McGeady, "The Digital Reformation: Total Freedom, Risk, and Responsibility" (1996) 10 Harv. J. Law & Tech. 137-148, at 142.

[12] Jay Dratler Jr., *Cyberlaw: Intellectual Property in the Digital Millennium* (NY: Law Journal Press, 2000), at 1-24 [Dratler].

[13] *WIPO Copyright Treaty*, available at <www.wipo.org/treaties/documents/english/pdf/s-wct.pdf> and *WIPO Performances and Phonograms Treaty*, available at <www.wipo.org/treaties/documents/english/pdf/s-wppt.pdf> (last accessed: 30/09/04). These were the first intellectual property treaties to address issues respecting the digital network environment. See discussion under Chapter Five, *infra*. (Both treaties shall hereinafter be referred to as the WIPO Treaties).

property.[14] As will subsequently be argued, the use of encryption to secure online materials is completely undesirable as it has the tendency to excessively curtail fair use or dealing and other copyright privileges.

As a result of the adoption of technological means of protection for online copyrighted materials, the traditional copyright notion of striking a delicate balance between the interests of rights holders in the control and exploitation of their works on the one hand, and society's competing interest in the free flow of ideas, information, and commerce, on the other hand, is in jeopardy. The balance has shifted dramatically to one side, as powerful right holders are allowed to reap excessive rewards. In other words, the public interest has dissolved like sugar in a hard rain.

What then is the way forward? In rejecting the modern approach of securing online materials with codes, I therefore argue for moral rights to be treated as fundamental human rights of authors to stem some of the threats presented by the internet. In my opinion, this will also lead to the fulfilment of states' obligations under the UN's *Universal Declaration of Human Rights*[15] to ensure respect for the integrity of creative endeavours and to preserve the fundamental authorial rights of authors. In addition, I recommend the adoption of international copyright principles to arrest the thorny legal issues of jurisdiction, enforcement and conflict of laws in the internet age.

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[14] Ejan Mackaay, "The Economics of Emergent Property Rights on the Internet" in P.B. Hugenholtz (ed.), *The Future of Copyright in a Digital Environment* (The Hague, London Boston: Kluwer law International, 1996), 13-26.

[15] G.A. Res. 217A (III), UN Doc. A/810, (1948) [UN Declaration].

B. OBJECTIVES OF THE STUDY

The objectives of the study are twofold. First, I shall consider moral rights protection by copyright law in the internet age. While arguing against the use of encryption-based technology to secure online materials, I shall argue for moral rights to be recognised as fundamental authorial rights in order to ensure respect for the integrity of intellectual creativity. Second, I shall examine the impact of the internet on traditional copyright concepts and principles respecting moral rights protection and argue for the adoption of international copyright principles in light of the challenges facing the legal community.[16] However, for a proper appreciation and understanding of this research, it is important to proceed according to the following structure.

C. STRUCTURE

This paper is divided into seven Chapters. Chapter One has two main components: (A) a discussion of the general background to economic and moral rights protection. I also seek out the reason why moral rights are protected only under copyright law, but not under patents or trademarks as well. In section (B), I examine the basic principles of moral rights protection under copyright law. The principles discussed in this Chapter may apply *mutatis mutandis* to the economic rights protection under copyright law. The discussion will focus on the basic concepts and principles that underlie copyright regimes in the United States, Canada, and the United Kingdom. I shall highlight the differences that exist in the three jurisdictions, the result of each country's

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[16] F.C. DeCoste, *On Coming To Law: An Introduction To Law In Liberal Societies* (Markham Ont.: Butterworths, 2001), at p.7 identifies the legal community as consisting of judges, legal scholars, and practitioners – hereafter in this paper may be referred to as "lawyers" [DeCoste].

perception of its economic and political welfare. It is however important to indicate that the discussion of the requirement of originality will be more extensive, because of the importance of this requirement to my later analysis.

Chapter Two examines the moral rights aspect of copyright protection. This Chapter proceeds on the premise that moral rights aspect of copyright protection has been marginalised for centuries, especially in the common law world. The Chapter has five aims: in section A, I consider the development of moral rights in the common law world, with a brief reference to the civil law tradition. In addition, I seek out the reason why moral rights protection has less foothold in the common law world. In section B, I answer the question: *What are moral rights*? Moreover, I will briefly consider some types of rights commonly recognised as moral rights of authors. In section C, I shall identify two theories that underpin copyright, including moral rights, protection and make a brief reference to the problems that surround the theoretical underpinning of copyright under this Section. In section D, I argue for moral rights to be taken more seriously. Here, I argue for moral rights to be considered as fundamental human rights of authors to stem some of the internet threats. The last Section answers the question: *Why should moral rights be treated as human rights*? It is here that the principle of originality discussed in Chapter One becomes handy.

Chapter Three begins with a discussion of the general principles respecting moral rights protection under the *Berne Convention*[17] in order to understand national obligations

[17] *Convention for the Protection of Literary and Artistic Works*, concluded at Berne on September 9, 1886 (most recent revision: *Paris*, 1971) (hereinafter "the Berne Convention").

under the Convention. The discussion sets the pace to compare and explore the existing statutory protection of moral rights in three common law jurisdictions (the US, Canada and the UK), with a brief reference to the types of moral rights contained under the *French Intellectual Property Code*.

Currently, a debate is raging as to whether internet technology will simply lead to a further evolutionary development of copyright law or whether its implications are so great as to necessitate revolutionary reconceptualisation of the traditional concepts of copyright law. Chapter Four argues that the internet presents unprecedented challenges to traditional principles respecting moral rights protection. As a result, the centre cannot hold. Besides the technological threat presented by the internet to moral rights protection, I will examine the impact of online activities on traditional copyright principles, such as jurisdictional issues and conflict of laws issues. The internet treats national borders with utter contempt. How then can the traditional copyright principle of territoriality be sustained in the internet age?

Of course, the discussion would not be complete if recent international attempts and their impact on the national laws were not examined. International attempts were made to tackle, *inter alia*, the challenges confronting moral rights protection in the internet age. As will be shown in Chapter Five, the result has created a certain amount of turbulence. While the internet is opening up enormous possibilities for low-cost communication on a global scale, legal and policy developments may foreclose the prospect of an information society with free circulation of ideas and information. This examination will consider the fallout from the two WIPO Treaties and the US *Digital*

Millennium Copyright Act, 1998.[18]

In Chapter Six, I will articulate further some of my suggestions in the earlier chapters and provide options for reform. I will also make additional recommendations for the adoption of international copyright principles to tackle some of the legal challenges confronting moral rights protection in the internet age.

The final Chapter will summarise the observations, recommendations and conclusions of the earlier chapters. I shall also use this Chapter to highlight the salient points that resonate and bear emphasis throughout the discussion. Reference shall also be made to the impact of those internet developments discussed in Chapter Four on the legal community. The Chapter concludes with the main recommendations of this study: that while it may have been possible at one time for national copyright laws to operate in isolation from other national laws, the advent of internet technology, which recognises no national boundaries, necessitates the adoption of international copyright concepts to stem the onslaught of the internet; and this calls for the adoption of international copyright principles and concepts.

[18] Pub. L. No. 105 - 304, 112 Stat. 2860 (1998) (hereinafter called the *DMCA*).

CHAPTER ONE

CONTEXT OF COPYRIGHT AND ANALYSIS OF TRADITIONAL COPYRIGHT CONCEPTS

A. LEGAL PROTECTION OF COPYRIGHT

Many copyright practitioners might face the experience of a potential or existing client asking, "I have been told that I can *patent* the *copyright* on the *design* of my *trade-mark* to make it *confidential*! How true is that?" This may sound comical, but it is an indication that the lay client is completely at sea. In reply, the lawyer has to explain that patent, copyright, industrial designs, trade-marks, and law of confidentiality all protect different things, although with some overlaps.[19] Therefore, by reason of their diverse nature, bundling them together may be problematic. For example, while computer software programs are protected by copyright law, some aspects are also protected by patent law. As mentioned elsewhere, this study focuses on the moral rights protection under copyright law.

Copyright law protects both property rights in the works created and the personality rights in the author's expression embodied in these works. These rights protected by copyright can be classified into two broad categories: moral rights and

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[19] See discussion by Gordon J. Zimmerman, "Extending the Monopoly? The Risks and Benefits of Multiple Forms of Intellectual Property Protection" (2000-2001) 17(2) *Canadian Intellectual Property Reviews* 345-376.

economic rights.[20] Moral rights protection primarily seeks to prevent the distortion or mutilation of a work, and to protect the author's right of acknowledgment of authorship. On the other hand, the economic protection under copyright is designed to give financial rewards to creators of copyrightable materials.[21] They are often contrasted with moral rights because the latter are concerned with money whereas the former are concerned with "honour".[22]

Therefore, viewing copyright mainly as the right to secure protected work from being copied is an oversight, if not a fundamental flaw. The term "copyright" is somewhat misleading. The owner does not merely have the right to "copy" the work or exercise control over its copying. The owner also has moral rights. Moral rights impose some boundaries on the exercise of these economic rights. Therefore, I suggest that the protection of economic rights should move in tandem with that of the moral rights.[23]

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[20] As indicated elsewhere, besides these two categorizations, some countries grant additional protection to neighbouring rights and derivative rights as well: see for example, Canadian *Copyright Act* Part II; the US *Copyright Act*, Section 103.

[21] Ysolde Gendreau, "Moral Rights" in Gordon F. Henderson (ed.) *Copyright and Confidential Information Law of Canada* (Toronto: Thomson Professional Publishing, 1994) 161-200, at 164.

[22] See Gordon F. Henderson, *Copyright and Confidential Information Law of Canada* (Toronto: Thomson Professional Publishing, 1994), at 13-14.

[23] As far back in the 18th-century, Lord Mansfield in the case of *Millar v. Taylor* (1769) 98 E.R. 201 at 252-253, recognised copyright as a blend of both economic and personal rights of authors: "From what source, then, is the common law drawn...? [An author] can reap no pecuniary profit if, the next moment after his work comes out, it may be pirated upon worse paper...The author may not only be deprived of any profit, but lose the expense he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own work. He cannot prevent *additions*. He cannot

One may ask the question: Why is moral rights protection granted only under copyright law? Why don't we have moral rights protection under other IP systems, such as patents and trademarks? Phillips, Durie and Karet appear to provide the answer: that moral rights exist only in works that have indivisible connection with the author and, for that reason, those works have been limited to literary, artistic, musical, dramatic works, and so forth.[24] In other words, since materials protected under, let's say, patents do not have that personal attachment to the creator, no moral rights protection is granted under patents. In my view, moral rights protection under copyright law evolved as a matter of legal policy, which is based on the notion that artistic and literary works were not mere commodities, but also forms of personal expression of thoughts, choices and sentiments as well.

The main purpose of the concept of moral rights is to prevent the alteration or mutilation of a work and it stresses the individual and intimate relationship between the author and her creation.[25] This allows the author to express herself through her work in

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retract errors. He cannot amend; or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, to the *disgrace and against the will of the author*; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published." (emphasis added).

[24] Jeremy Phillips, Robyn Durie and Ian Karet, *Whale on Copyright* 5th ed. (London: Sweet & Maxwell, 1997), at 58.

[25] Frederic Pollaud-Dulian, "The Internet and Authors' Rights", in *Perspectives on Intellectual Property* (London: Sweet & Maxwell, 1999), at vi.

total freedom since she is assured that nobody can prejudice her work.[26] I now turn to examine the basic rules that underlie copyright, including moral rights, protection.

B. PRINCIPLES AND LIMITATIONS

Merely creating a "work" is not sufficient to receive legal protection under copyright law. The creator must satisfy some statutory requirements to receive copyright, and for that matter, moral rights protection. These requirements and principles include the requirement of nationality, concept of copyrightability, domestic protection, automatic protection, originality, and so forth. These principles evolved against the backdrop of the *Berne Convention* and the *TRIPS Agreement* and they are discussed below. Both treaties aim at synchronising different territorial laws on, *inter alia*, copyright to lessen inconsistency in protection, by laying down some minimum standards. As mentioned elsewhere, the discussion of the requirement of originality will be more extensive than the discussions respecting the other principles, because of the importance of the requirement of originality to my later analysis.

It is however instructive to add that notwithstanding the fact that international conventions shape domestic copyright laws of states, there is no such thing as 'international copyright'; instead, there is a multiplicity of national copyright regimes.[27]

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[26] Laurence Goldgrab, "France" in Cees van Rij (ed.), *Moral Rights* in I.A.E.L (Netherlands, Belgium: MAKLU Publishers, 1995) 81-97, at 81.

[27] See Jane C. Ginsburg, "Putting Cars on the 'Information Superhighway': Authors, Exploiters and Copyright in Cyberspace" in P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment* (The Hague, London, Boston: Kluwer Law International, 1996) 189-219, at 215-216.

Therefore, on the basis of international copyright conventions[28], it can be argued that there is a principle of territoriality, whereby each country provides for its own mechanism of protection. Torremans notes: "[r]ights are granted and protected on a country-by-country basis under the guidance of the general national treatment principle and the minimum provisions of the *Berne Convention* and the *TRIPS Agreement*."[29]

Copyright, including moral rights protection, is primarily a creature of statute, and it is granted to every person who creates an original work upon satisfying some statutory conditions, such as the nationality of creator of the work or the place of publication of the work. For example, if a Canadian writes a book and she receives copyright protection in Canada, similar protection is automatically granted to the author in all other countries that are members of the *Berne Convention*[30], the WTO[31]or the *UCC*.[32] Now, since almost

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[28] Article 2 of the *UCC*, *infra* note 32; Article 5(1)(3) of the *Berne Convention*.

[29] Paul Torremans, "Moral Rights in the Digital Age" in Irini A. Stamatoudi and Paul L.C. Torremans (eds.), *Perspectives on Intellectual Property: Copyright in the New Digital Environment* (London: Sweet & Maxwell, 2000) Vol.8 99-114, at 99.

[30] See Member states of the *Berne Convention*, available at http://www.wipo.int/treaties/en/documents/word/e-berne.doc (last date accessed: November 20, 2004).

[31] See Member states of the World Trade Organisation, available at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (Date accessed: September 30, 2004).

[32] See Member states of the *Universal Copyright Convention*, adopted on September 6, 1952 in Geneva, Switzerland (most recent revision: Paris, France on July 24, 1974). (hereinafter "the UCC").

every significant state belongs, at least, to the WTO, the *Berne Convention*, or the UCC[33], the requirement of nationality or place of publication of the work have been rendered otiose. Hence, very few works of creativity fall outside the net of protection, because copyright practically has a global reach. These works protected by copyright are in the form of literary, dramatic, musical, and artistic work expressed in tangible form.[34] The differences in the range of protectable subject matter of copyright in the US, Canada, and the UK is as a result of economic, political and cultural differences. A wide range of intellectual materials receive protection under copyright law.

In addition to this principle of copyrightable materials is the principle that copyright law does not protect the idea or concept behind a work, but simply the form or expression of that idea or concept. This permits ideas, facts and concepts, as the building blocks of creativity, to remain free for all to use, and makes it possible for a work identical to the copyrighted work to be produced independently, without infringing the rights of the holder of the first copyright work. The Canadian case of *Delrina*

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[33] In addition, under section 5(2) of the Canadian *Copyright Act*, the Minister of Industry by notice published in the *Canada Gazette* can extend protection to cover a non-treaty country that grants substantially the same copyright protection to Canadians.

[34] Section 5(1) of the *Canadian Copyright Act*, R.S.C. 1985, c. C-42. Under section 102(a) of the US *Copyright Act*, 1976, protectable subject matter include: original literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; sound recordings; and architectural works. In UK, section 1(1) of the *Copyright, Designs and Patents Act*, 1988, states that copyright subsists in original literary, dramatic, musical or artistic works; sound recordings, films, broadcasts or cable programmes; and the typographical arrangement of published editions.

Corporation v. Triolet Systems Inc. is a classic statement of this principle: "Copyright does not subsist in 'any arrangement, system, scheme, method for doing a particular thing, procedure, process, concept, principle, or discovery, but only in an author's expression of them."[35] But, if there are very limited ways of expressing an idea[36], courts are more and more reluctant to allow copyright protection in any expression of the idea.[37]

In US parlance, "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[38] The result is that copyright protection assures creators of intellectual products the right to their original expression, and also encourages others to build freely upon ideas and information conveyed by the work. This permits other people to compete in the market by creating their own works. One commentator argues that the idea/expression dichotomy constitutes an inherent limitation that is designed to promote the dissemination of new works and to ensure the preservation of

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[35] (1993), 47 C.P.R. (3d.) 1, at 44 (Ont. Court – Gen. Div.), O'Leary J.

[36] In that case, there is said to be "merger of idea and expression", especially in computer programs. The merger doctrine is well articulated under US law.

[37] See Howard P. Knopf, "Limits on the Nature and Scope of Copyright" in Gordon F. Henderson (ed.) *Copyright and Confidential Information Law of Canada* (Toronto: Thomson Professional Publishing, 1994) 229-281.

[38] *Copyright Act, 1976*, s.102(b). See also Article 2 of the *WIPO Copyright Treaty*, which provides that "[c]opyright protection extends to expressions and not ideas, procedures, methods of operation or mathematical concepts as such." Article 9(2) of the TRIPS Agreement also has the same wording, save the addition of "shall".

public interest.[39]

Copyright protection is automatic, without the need for formalities, examination or compulsory registration. This cardinal principle is epitomised under Article 5(2) of the *Berne Convention* that "[t]he enjoyment and exercise of these rights (including moral rights) *shall not* be subject to any formality." Put in barest terms, unlike patents and trade-mark protection, there is no requirement of prior registration before creators can receive copyright protection for their works. However, for evidentiary purposes, some states provide an optional opportunity for copyright holders to obtain registration, which can influence the remedies that a copyright holder can pursue when there is an infringement.[40]

The last (and arguably the most important) principle to be considered is the requirement of originality that applies to the expressive element of the work and not the idea. One commentator refers to this requirement as the *sine qua non* of copyright.[41] For

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[39] Lucie M.C.R. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (The Hague, London, Boston: Kluwer Law International, 2002), at 15 [Guibault].

[40] See the US *Copyright Act*, 1976, Ch.4; Canadian *Copyright Act*, 1985, Part V.

[41] Sheldon Halpern, *Copyright Law: Protection of Original Expression* (Durham, North Carolina: Carolina Academic Press, 2002), at 19. See also *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 US 340, at 345-347: the US Supreme Court noted that "the *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author.... [But] facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery." (emphasis added).

a work to be protected by copyright, it must be *original* – a seemingly simple concept that in practice yields erratic results. The word "original" in copyright law is a term of art. The requirement of originality is not dependent on novelty or artistic merit of the work. It simply means that the work must originate with the author or creator, in the sense of not being copied. Unlike patent protection, novelty is not a requirement in copyright law; it is only required that the work be independently created. The famous dictum of Peterson J. in the case of *University of London Press Ltd. v. University Tutorial Press Ltd.*, sums it up:

> [T]he 'word' original does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought... The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author.[42]

The requirement of originality is one criterion used to distinguish protectable from non-protectable subject matter.[43] These general principles and conditions of copyright protection discussed above are basically synonymous in the US, Canada, and the UK. Notwithstanding this fact, when it comes to judicial determination of whether a work satisfies the requirement of originality, the US courts, the UK courts, and the Canadian courts apply different standards of evaluation, a matter to which I will now

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[42] (1916) 2 Ch. 601 at pp.608-609, Peterson J. [This case is also an authority for the proposition that the courts should not look at literary quality or the style of a work in determining the existence of copyright]. See also *Victoria Park Racing & Recreation Grounds Co. v. Taylor* (1937), 58 C. L. R. 479, 43 A. L. R. 597 (Australia H. C.), Dixon J.

[43] Guibault, *supra* note 39, at 15.

turn.[44]

I. DETERMINING THE REQUIREMENT OF ORIGINALITY

i. THE UNITED STATES

The judicial interpretation of the originality requirement by the U.S. courts is based on a school of thought that, for a work to receive copyright protection, a threshold of *creativity* must be met. As Mazeh rightly points out, the courts in the U.S. assert that skill, labour, and judgment are not sufficient; the work must also exhibit creative spark to qualify for copyright protection.[45] In *Feist Publications Inc. v. Rural Telephone Service Co.*[46], the U.S. Supreme Court held, *inter alia*, that "to qualify for copyright protection, a work must be original to the author – means only that the work was *independently created* by the author, as opposed to copied from other works, *and* that it possesses at least some minimal *degree of creativity*..."[47] The creativity requirement, therefore, subsumes the not-copied requirement.[48] Even though the Court there acknowledged the significant investment of skill, labour and judgement by the respondent in its telephone

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[44] See Yo'av Mazeh, "Canadian Originality and The Tension Between the Commonwealth and the American Standards for Copyright Protection: The Myth of Tele - Direct" (2003) 16 I. P. J. 561-598.

[45] Mazeh, *ibid.* at 564. See also Michael Rustad and Cyrus Daftary, *E-Business Legal Handbook* (NY: Aspen Law & Business, 2001), at 97.

[46] 113 L. Ed.2d.358, 499 U.S. 340 (US S.C.).

[47] *Ibid.* at 362 (emphasis added).

[48] Abraham Drassinower, "A Right-Based View of the Idea/Expression Dichotomy in Copyright Law" (2003) 16 Can. J. L. & J. 3, at 7.

directory, it nevertheless held that no copyright existed in the directory, because it lacked the requisite degree of creativity. Mazeh puts the ratio thus: "the *Feist* case holds that in American law, *skill, labour and judgment* are not sufficient to qualify a work as original. In the *Feist* case it was held that *creativity* is an essential requirement for the American interpretation of the notion of originality."[49]

The "spark of originality" standard has been criticised as too high, since a creativity standard implies that something must be novel or non-obvious – concepts more properly associated with patent law than copyright law.[50] The U.S. approach has found favour with courts in other jurisdictions, such as in Germany[51] and Italy[52], albeit with some variations.

ii. THE UK

The courts in the UK interpret the requirement of originality based on a school of thought different from that which grounds the U.S. jurisprudence. The UK courts follow the traditional Commonwealth criteria[53] based on the involvement of skill, labour and judgment *simpliciter* in determining whether a work satisfies the requirement of

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[49] Mazeh, *supra* note 44, at 571 (emphasis added).

[50] See *CCH Case*, *infra* note 59, at 356.

[51] Gerhard Schricker, "Farewell to the 'Level of Creativity' in German Law?" (1995) 26 IIC 41.

[52] *Copyright Act*, 1941 (*Italy*) at article 1.

[53] See *Interlego A. G. v. Tyco Industries Inc.*, [1989] A. C. 217 (Hong Kong P. C.), *per curiam*; *Walter v. Lane*, [1900] A. C. 539 (U.K., H. L.), *per curiam*; *Desktop v. Telstra*, [2002] FCAFC 112 (Australia Fed. Ct.), *per curiam*; *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 All ER 465 (UK, H.L.), *per curiam*.

originality. The UK courts have found that a work that originates from an author and is more than a mere copy of another work is sufficient to ground copyright.[54] Thus, the UK courts usually apply a very low threshold test of originality. This has been referred to as the "sweat of the brow" approach as against the "spark of originality" approach in the US. To this effect, authors of the copyright works in the UK have only to demonstrate that they expended a significant effort in creating the work.

The "sweat of the brow" approach has also been criticised as too low a standard, since it shifts the balance of copyright protection in favour of authors, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works.[55]

iii. CANADA

Until recently, Canadian courts favoured the traditional Commonwealth criteria (still favoured by the UK). However, in 1997, there was a shift in approach (which did not gain root) by the Canadian Federal Court of Appeal in the case of *Tele-Direct (Publication) Inc. v. American Business Information Inc.*[56], to replace the Commonwealth criteria with the American one. In a subsequent decision by the same Court, in the case of *CCH Canadian Ltd. v. The Law Society of Upper Canada*[57], the Court gave a narrow interpretation of the *Tele-Direct* decision so as to revert to the traditional Commonwealth approach of determining originality based on skill, labour and judgment *simpliciter*. The

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[54] *University of London Press Ltd. v. University Tutorial Press Ltd.* (1916) 2 Ch. 601, Peterson J.

[55] See *CCH Case*, *infra* note 59, at 356.

[56] 76 C. P. R. (3d) 296; [1998] 2 F.C. 22 (FCA), per Decary J.A.

[57] (2002), FCA 187, Per Linden J.A. (*CCH Case*).

Court, relying on *Bishop v. Stevens*[58], criticised the trial Judge's holding that "for a work to receive copyright protection it must exhibit imagination or creative spark", which, to the Court, was tantamount to judicial usurpation of the functions of Parliament. It, therefore, restored the traditional Commonwealth approach that a work is original if the creator demonstrates the involvement of skill, labour, and judgement.

The *CCH Case*[59] travelled to the Supreme Court of Canada. The Supreme Court gave a perceptive analysis of the standard of originality that must be met to receive copyright protection. The Court had to decide, *inter alia*, whether the headnotes, case summary, topical index and compilation of reported judicial decisions are original works in which copyright subsists. The Court took the middle position between the "spark of originality" approach (prevailing in the US) and the "sweat of the brow" approach (prevailing in the UK). The Court rejected the US approach and held that "[a]n 'original' work…is one that originates from an author and is not copied from another work. *In addition*, an original work *must* be the product of an author's exercise of skill and judgment. *The exercise of skill and judgment required to produce the work must not be so trivial* that it could be characterised as a purely mechanical exercise."[60] The Supreme Court further notes that "[w]hile creative works will by definition be 'original' and covered by copyright, creativity is not required to make a work 'original'."[61] Thus, from Canadian jurisprudence, the US requirement of creativity is superfluous for a work to be

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[58] [1990] 2 S. C. R. 467 at p.477, *per curiam*.

[59] *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004) 1 S.C.R. 339 (S.C.), per McLachlin C.J.

[60] *Ibid.* 352, per McLachlin C.J. (emphasis added).

[61] *Ibid.*

original. In my view, the Canadian position is closer to the UK position and it fairly balances the two competing interests in copyright system: the public interest and the private interest.

This discussion of the originality requirement respecting the expressive element of the author's choice, will and knowledge as expressed in the work will ground my argument entailing the human rights status of moral rights in Chapter Two.

An author or creator (whether in the US, Canada or the UK) who satisfies these requirements is granted a statutory term of protection. Such protection grants a number of exclusive rights to the copyright holder for a determinable period of time. Suffice it to point out that these terms range, at least, from fifty years to over hundred years.[62] As mentioned elsewhere, during the protected period, the copyright holder has both economic and moral rights[63] in relation to the work. The moral rights include the rights of association, attribution, integrity, and so forth. While ownership of these rights is independent of the economic rights, they do not arise if there is no copyright in a work. The moral rights protection granted to an author allows her to do these acts and can stop others from doing them without her consent. Traditional moral rights protection thus provides a degree of monopoly which is limited by the breadth and width of the statute

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[62] *Psalm* 90:10, "As for the days of our life, they contain seventy years..." If the basic term of protection is the life of the authors plus fifty years thereafter, then going by the Psalm verse, copyright protection can last for about 120 years. See section 6 of the Canadian *Copyright Act*. In my opinion the term of protection is too long. Protection for 50 years may be reasonable.

[63] As a result of the down-trodden state of moral rights protection, I shall argue for them to be recognised as fundamental human rights. See Chapter Two, *infra*. We should also not lose sight of the fact that both economic and moral rights could be held separately.

granting the protection.[64] This legal protection empowers authors to institute legal action to protect and enforce their rights from country to country.

Until recently, the foregoing principles have sought to balance the interests of authors and users, not only in the *real* world but also in the *virtual* world of the internet, to prevent abuse. However, as I shall subsequently articulate, the introduction of encryption-based protection for copyrighted materials on the internet has upset the "copyright bargain" and threatened the public domain.

Next in the discussion is to consider the components of moral rights protection, and answer the question: *What are moral rights*? In the next Chapter, I will also examine the basis upon which copyright, including moral rights protection, is justified. I shall argue for moral rights to be recognised as basic human rights of authors, and answer the question: *Why should moral rights be treated as human rights*?

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[64] See Graham A. Knight, "The Fall and Rise of Sweat of the Brow" (1999) 13 I. P. J. 337-352, at 338; *Compo Co. v. Blue Crest Music Inc.* (1980) 1 S.C.R. 357 (S.C.C), per Estey J.

CHAPTER TWO

COMPONENTS OF MORAL RIGHTS PROTECTION: TAKING MORAL RIGHTS SERIOUSLY

> That the individual shall have protection in *person* and in *property* is a principle as old as the common law; but it has been found necessary from time to time to *define anew* the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of *new rights*...[65]

A. INTRODUCTION

As indicated in the introduction, contemporary discussions of copyright generally focus on economic rights protection and ignore moral rights protection.[66] Current economic and market demands have contributed immensely to this otherwise unfortunate development. Even international attempts to consolidate intellectual property rights with trade issues marginalise moral rights protection under the *TRIPS Agreement*.[67] Moreover,

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[65] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy" (1890) 4 Harv. L. Rev.193. (emphasis added).

[66] See Jerome Passa, "The Protection of Copyright on the Internet under French law" in Frederic Pollaud-Dulian (ed.), *Perspectives on Intellectual Property: The Internet and Authors' Rights* (London: Sweet & Maxwell, 1999) Vol.5 at 25-72; Raymond Shih Ray Ku, "The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology" (2002) Vol. 69 U. Ch. L. Rev. 263-324; William Landes and Richard Posner, "An Economic Analysis of Copyright Law" (1989) 18 *Journal of Legal Studies* 325.

[67] Article 9(1) of the *TRIPS Agreement* is worded as follows: "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members *shall not* have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis*

the purported justifications for copyright protection over-emphasise the economic exploitation of works to the detriment of moral rights protection of authors.[68] According to Lea, moral rights marginalisation should be understood as a result of the influence of "...the more general copyright's development along economic lines [and] the steering effect of pre-existing common law principles, in particular, the development of copyright by analogy to other types of property rights such as rights affecting lands and later on, choses [things] in action..."[69] However, moral rights would not have suffered that fate if their development were seen as an exception to the basic principle of property law that (besides legal constraints) one may do whatever she chooses with that which she owns.

The initial common law attempts to protect moral interests of authors ranged from express contractual agreements and policies and the torts of passing off, injurious falsehood and defamation, all of which deal with misrepresenting and lowering the

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[moral rights protection] of that Convention or of the rights derived therefrom." (emphasis added).

[68] See for example, Koelman and Helberger, *infra* note 92, emphasising the utilitarian bent of copyright protection:

> "To remedy the market failure arising from the inability of producers of information to exclude its use efficiently, copyright law grants to the right-holder a statutory monopoly over the use of a work, thus ensuring that he can recoup his investments. In this way, copyright provides an incentive to create. Presumably, the production and dissemination of works will thus be promoted, thereby benefiting society as a whole."

[69] Gary Lea, "Moral Rights and the Internet: Some Thoughts from Common Law Perspective" in Frederic Pollaud-Dulian (ed.), *Perspectives on Intellectual Property: The Internet and Authors' Rights* (London: Sweet & Maxwell, 1999), Vol.5 89-103 at 90.

reputation of a person.[70] Protection was also granted to moral interests of authors through the action for breach of confidence.[71] It is therefore not surprising that common law jurisdictions cautiously and reluctantly adopted the concept of moral rights as part of their copyright laws. As Lea points out, moral rights were perhaps perceived as a regrettable import from the civil law system.[72] Illustrative is the recent Supreme Court of Canada rejection of the introduction of the otherwise "alien concept" of the *civiliste* conception of *droit de destination* into Canadian law in the case of *Theberge v. Galerie d'Art du Petit Champlain Inc.*[73] The right of destination gives the author the right to control to a considerable extent the use that is made of authorised copies of her work. In my view, this case can raise concerns in Canada, a country where both the civil and the common law traditions co-exist.

The civil law tradition, unlike the common law tradition, has a more robust recognition of moral rights. For example, moral rights protection under Article L. 121-1 of the *French Intellectual Property Code* is perpetual and inalienable. The Code provides that "[a]n author shall enjoy the right to respect for his name, his authorship and his work.

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[70] Lea, *ibid.* at 90-91.

[71] See *Gilbert v. Star Newspaper Co.* (1894) 11 TLR 4. See also Lord Mansfield in *Millar v. Taylor* (1769) E.R. 201, which indicates that the equitable action for breach of confidence was also one major means of protecting non-economic interests of authors of unpublished works.

[72] Lea, *ibid.*

[73] 17 C.P.R. (4th) 161, 2002 CarswellQue 306; [2002] SCC 34, para. 28, per Binnie J.

This shall attach to his person. It shall be perpetual, inalienable and imprescriptible..."[74] It further provides that "[t]he author alone shall have the right to divulge his work...This right may be exercised even after expiry of the exclusive right of exploitation set out in Article L. 123-1." This protection is justified on the ground that a work of art embodies and helps to realise its creator's personality or will.[75] In fairness to the common law tradition, which accepted the waiver of moral rights, the development of "moral interests" of authors gradually took inspiration from other branches of the common law.[76] Hence, my resolve to promote the protection of moral rights of authors.

B. WHAT ARE MORAL RIGHTS?

As mentioned elsewhere, copyright in a work is a "bundle of rights" ranging from economic rights to moral rights, and in some jurisdictions additional protection is granted to neighbouring rights and derivative rights. Economic rights grant exclusive right to the owner to reap the pecuniary benefits of her creative endeavour through producing, reproducing, performing, publishing, and so forth.[77] These economic rights have the attributes of real or personal property, and may be sold, assigned, or passed on to another upon the death of the owner.

Moral rights protection reflects a belief that the author's creation is the extension

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[74] Article L. 121-1.

[75] William Fisher, "Theories of Intellectual Property" in Stephen R. Munzer ed., *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001), 168-199, at 174.

[76] Lea, *supra* note 69, at 90.

[77] See for example, the Canadian *Copyright Act*, 1985, section 3(1).

of the author, and therefore the author can control how the public views the author through her creation.[78] Moral rights are basically personal rights that connect an author with her work. That is, moral rights represent the extension of the author's personality, and give recognition to the personal bond between the author and her work. To put it in proper terms, they are the emanation of the author's mind, personality and represent her dignity as expressed in the work. Gendreau explains this humanistic approach to copyright law as follows: "Since [moral rights protection] is the result of the author's intellectual activity, the work can be said to emanate from him and to derive its originality from his personality. It thus becomes an external manifestation of his personality and must be protected as such."[79] Parting with the economic rights does not lessen the author's personal attachment to her work, and she can have recourse against any one who infringes the moral rights.[80]

Generally, moral rights include: a paternity right[81] (which entitles an author to be identified with her work); an integrity right (which allows the author to prevent or object

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[78] See Eric Schlater, "The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet" available at <http://www.law.berkeley.edu/journals/btlj/articles/vol12/Schlater/html/reader.html> (last date accessed: 30/09/04).

[79] Gendreau, *supra* note 21, at 164.

[80] David Vaver, *Copyright Law* (Toronto, Ontario: Irwin Law, 2000), at 158.

[81] The word "paternity" is a sexist term. Some prefer to use the word "authorship". However, in this paper, I will use the word "paternity" since it is the common term used in most literature.

to derogatory treatment of her work); a right of disclosure[82] (which permits an author to withhold her work from being published); and a right of non-attribution or a right to object to false attribution[83] (which allows an author to prevent a work from being falsely attributed to her). As non-pecuniary rights, they are not bought or sold by authors and others, but exist specifically to protect the author against the depredations of others.[84] As already alluded to, in some civil law jurisdictions, this special bond between the author and her work is perpetual and unassignable.[85] In some common law jurisdictions, such as Canada and the UK, moral rights are not assignable, but can be waived.[86] Unlike economic rights, the moral rights cannot be marketed. Two of those rights are briefly considered below.

i. Paternity Right

The paternity right of authorship is the right for a person's name to be used to identify her as the author of the work if any attributable acts are done in respect of the work. It is not necessary for the author to use her real name when that work is

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[82] Recognised under section 85 of the English *Copyright, Design and Patent Act*, 1988 (*CDPA*). In Canada, the right of disclosure or publication is an economic right. See section 3 of the *Copyright Act*.

[83] Recognised under section 84 of the *CDPA*. In Canada, the *Copyright Act* entitles an author to remain anonymous or to be associated with the work by name or under a pseudonym. See section 14.1(1).

[84] Phillips, Durie and Karet, *supra* note 24, at 15.

[85] For example, under the *French intellectual Property Code*, Article L. 121-1; the *German Copyright Law*, 1965. In Canada, the *Copyright Act*, section 14.1(2) allows for waiver, but not assignment.

[86] In Canada, see the *Copyright Act*, section 14.1(2); In the UK, see the *CDPA*, sections 87 and 94.

disseminated to the public. The author's right to insist upon the use of a pseudonym comes within the ambit of this right.[87] Moreover, an author can rely on the right of paternity to maintain her anonymity.[88] The exercise of this right is in relation to different modes of exploitation of a work, such as the production, reproduction, publication, performance, exhibition of artistic work, and so on.

ii. Integrity Right

The author of a copyrighted work has the right of integrity, which is the right to prevent others from subjecting the work to derogatory treatment. The essence is to prevent the doing, in relation to the work, of anything that results in the distortion of, the mutilation of, or the alteration to, the work in a manner that is prejudicial to the honour and reputation of the author. This seeks to ensure that the work remains in the state in which the author has decided to make it known to the public.[89] It also protects the author against unfair use or misuse of her name or personality.[90] Vaver commenting on the Canadian position has aptly suggested:

> The reputation referred to no doubt is primarily the author's literary or artistic reputation but, since a person's reputation is ordinarily indivisible, should also encompass the author's personal reputation as well.[91]

Having given the description of moral rights, I now turn to make a brief

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[87] See Canadian *Copyright Act*, section 14.1(1).

[88] *Ibid.*

[89] Gendreau, *supra* note 21, at 164.

[90] William Strauss, "The Moral Right of the Author" (1955) 4 *The American Journal of Comparative Law* 506.

[91] David Vaver, "Authors' Moral Rights in Canada" (1983) 14 *International Review of Industrial Property and Copyright Law* 329, at 356.

examination of the basis upon which copyright, including moral rights protection, is justified.

C. OBJECTIVES AND JUSTIFICATIONS

There are two standing theoretical justifications for copyright protection, namely, economic/utilitarian theory (that intellectual property protection is justified in terms of economic efficiency), and the Lockean/labor desert theory (that intellectual property rights are natural rights earned through adding labour to the common resource of information with the proviso that enough and as good is left for others). Both are briefly considered below.

i. Economic Justifications

Generally, in pursuit of certain socio-economic goals, copyright protection is granted to balance the interests of copyright holders and those of the general public. Koelman and Helberger sum it up:

> To remedy the market failure arising from the inability of producers of information to exclude its use efficiently, copyright law grants to the right-holder a statutory monopoly over the use of a work, thus ensuring that he can recoup his investments. In this way, copyright provides an incentive to create. Presumably, the production and dissemination of works will thus be promoted, thereby benefiting society as a whole.[92]

According to Sterling, the "[c]reation of works involves investment of time, patience, skill, creative endeavour and money. Such investment should be protected. If it is not protected, the author loses the incentive to undertake the project. Production of

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[92] Kamiel J. Koelman and Natali Helberger, "Protection of Technological Measures" in P. Bernt Hugenholtz (ed.), *Copyright and Electronic Commerce*, (The Hague, London, Boston: Kluwer Law International, 2000) 165-227, at 189-190.

works benefits society. Consequently, it is necessary to give authors the incentive to carry on their work by providing, through copyright, the means to ensure their livelihood."[93]

Another related justification for copyright protection is based on the principle of utilitarianism. On the authority of Bentham[94], utilitarians argue that intellectual property protection provides incentive to produce intellectual objects, and leads to economic growth. The pursuit of that end requires lawmakers to strike a balance between, on the one hand, the power of exclusive rights to stimulate the creation of works and, on the other hand, the partially offsetting tendency of such rights to curtail widespread enjoyment of intellectual creations.[95]

The utilitarian approach has come under attack from a number of scholars for failing to take into account the differences among individuals. Ostergard argues that utilitarianism fails to take into account the inherent satisfaction enjoyed by creators in the production of intellectual objects.[96] He further argues that granting exclusive protection to authors can stifle the diffusion of technology and the alleviation of human suffering.[97]

ii. Moral Justifications

There is also another justification, which is based upon the natural law principle that an author has a certain inalienable right over her work – a right which is independent,

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[93] J.A. Sterling, *World Copyright Law* (London: Sweet & Maxwell, 1999), at 57.

[94] Jeremy Bentham, *Theory of Legislation* (R. Hildreth trans. 1840) (1st ed. 1802).

[95] Fisher, *supra* note 75, at 169.

[96] Robert L. Ostergard, *The Development Dilemma: The Political Economy of Intellectual Property Rights in the International System* (Eric Rice Ed.) (New York: LFB Scholarly Publishing LLC, 2003), at 19.

[97] *Ibid.* at 18.

personal and non-economic.[98] Roeder notes:

> [w]hen an artist creates, he does more than bring into the world a unique object having only exploitative possibilities; he projects into the world a part of his personality and subjects it to the ravages of public use.[99]

One commentator attributes the underlying theory constituting the basis for the protection of author's rights to the fact that a work of the mind is intimately associated with the author's personality, and as a result, they must be protected.[100] Whether or not we proceed in this direction, Sterling suggests that common principles of fairness support the idea that the unauthorised use of something produced by another person should not be socially condoned.[101] In that regard, he considers societal "condemnation of theft" as being one of the cardinal justifications of copyright legislation.[102]

The moral justification also acknowledges intellectual property rights as natural rights earned through adding labour to otherwise common resources of information with the proviso that enough and as good is left for others.[103] According to Craig, the Lockean

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[98] Robert Hauhart, "Natural Law Basis for the Copyright Doctrine of Droit Moral" (1985) 30 Catholic Lawyer 53, at 61.

[99] M. Roeder, "Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators" (1940) 53 Harvard Law Review 554, at 554-555.

[100] Giorgio Mondini, "Italy" in Cees van Rij (ed.), *Moral Rights* in I.A.E.L (Netherlands, Belgium: MAKLU Publishers, 1995), 105-113, at 105.

[101] Sterling, *supra* note 93, at 56.

[102] *Ibid.* at 55.

[103] John Locke, *Second Treatise of Government* ed. by C.B. Macpherson (1980) at p.29. The full text of Locke's famous par. 27 of the Second Treaties reads: "Though the earth, and all inferior creatures, be

vision of property entitlement, when applied to intellectual property, focuses upon the link between the author and her original intellectual work – a link conceptualised in terms of the investment of intellectual labour.[104] While it is true that the Lockean approach could also be consistent with a utilitarian conception of copyright, Locke's natural right-based approach often reveals a moralistic edge when applied in the field of intangible objects.[105]

Gordon also opines that the Lockean labor invested in intangibles involves a kind of "psychological identification, an 'infusion of personality'."[106] She therefore relies on

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common to all men, yet every man has a *property* in his own *person*: this no body has a right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes then he takes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*. It being by him removed from the common state nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men: for this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others." At par. 44 it reads: "From all of which is evident, that though the things of nature are given in common, yet man, by being a master of himself, and *proprietor of his own person, and the action of it, had still in himself the great foundation of property*; and that, which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the inconveniences of life, was perfectly his own, and did not belong in common to others." (emphasis in original).

[104] Carys J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002) 28(1) *Queen's Law Journal* 1-60, at 3.

[105] *Ibid.* at 1 & 7.

[106] Wendy J. Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property" (1993) 102 Yale L.J. 1533-1609, at 1547.

Locke's theory and argues that a properly conceived natural-rights theory of intellectual property would provide significant protection for free speech interest in that such theory takes care of the rights of the public as well as the interest of the right holder.[107] Radin suggests that intellectual property is an emanation of the person and the law should facilitate this personal aspect by recognising the right of persons (authors) to exercise control over their property (in this case intellectual property).[108] Based on the notions of authors' association with their own creations and of their entitlement to the fruit of their labour, moral rights protection is granted to allow authors to exercise control over their works.

Locke's labor theory has also been criticised as problematic when applied to objects that are essential items that affect developments and the livelihood of people. Moreover, Locke's labor theory fails to account for the cumulative inventive process that assigns sole ownership to those who utilise others' prior work.[109] In my opinion, while these criticisms may be more or less useful in the context of protection of economic rights, they do not help much in understanding why we should protect moral rights.

Although this paper is not intended to address the normative theory of copyright, it can be pointed out that these theoretical underpinnings of copyright protection are

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[107] *Ibid.*

[108] Margaret Jane Radin, "Property and Personhood" (1982) 34 Stan. L. Rev. 957-1015.

[109] Ostergard, *supra* note 96, at 16; *Ecclesiastes* 1:9: "That which has been is that which will be. And that which has been done is that which will be done. So there is nothing new under the sun."

fraught with fundamental difficulties.[110] It, however, suffices to indicate that besides much controversy over the extent of that social good and the societal price for protection, these theoretical justifications for copyright protection do not qualify as public justification. Such a justification is one that can be accepted even by those who disagree, because it proceeds from a shared concepts and normative ideas.[111]

D. MORAL RIGHTS AS FUNDAMENTAL HUMAN RIGHTS

Human rights consciousness has achieved a tremendous growth worldwide since the end of the Second World War. The cornerstone of the worldwide recognition of human rights is the *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly on December 10, 1948. But this consciousness has not spread across all corners of "rights" that are internationally recognised as human rights. One of such rights that has not received prominence in the worldwide education and in academic

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[110] For a detailed discussion of the problems associated with these theoretical underpinnings of copyright protection, see Katie Sykes, "Towards a Public Justification of Copyright" (2003) 61(1) U.T. Fac. L. Rev. 1; Ostergard *supra* note 96; Fisher *supra* note 75. Craig, *supra* note 104, explores the weakness and the dangers of a theory of IP grounded in a Lockean vision. She argues that the Lockean account mistakenly finds the justification for copyright in the relationship between an author and her work, rather than in the role played by intellectual works in the process of social dialogue. In her view, this threatens the public policy goals that copyright is intended to further. As mentioned elsewhere, I have excluded some of the criticisms (from writers such as Sykes, Craig and Ostergard) from my paper because they relate to the economic aspects of copyright protection, rather than the moral rights aspect of copyright which is the focus of this paper.

[111] See John Rawls, *A Theory of Justice*, revised ed. (Cambridge, Mass.: Harvard University Press, 1999), at 508 [Rawls].

discourse is the moral rights of authors as fundamental human rights. Evans observes that this renders the claim that human rights movement has achieved "amazing" progress since the adoption of the *UN Declaration* somewhat premature.[112]

As previously pointed out, the common law history behind moral rights development has contributed to their continuing marginalisation. The internet, as a new technology, has dealt a further blow to this already obscure aspect of copyright law.[113] My contention is that some of the legal quagmires that confront moral rights protection in the internet age can be overcome if moral rights consciousness is taken up in the mainstream international human rights protection. This requires a three-step approach: (i) harmonisation of authors' moral rights in an international treaty (if the provision under the *UN Declaration* is not enough); (ii) inclusion in national policies and human rights education by member countries; and (iii) subsequently incorporating them in human rights statutes. In the internet era, such an approach will reflect trends on how society should respect intellectual creativity and thus may be said to be in consonance with public policy considerations.[114]

Viewing moral rights of authors as fundamental human rights has deep historical support under the *UN Declaration*, only their pursuit has been unimpressive. It is

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[112] Tony Evans, "Universal Human Rights: As Much Round and Round As Ever Onwards" (2004) 7(4) *The International Journal of Human Rights* 155-168, at 159.

[113] The challenges to moral rights protection are discussed in Chapter Four *infra*.

[114] Kamiel J. Koelman, "Online Intermediary Liability" in P. Bernt Hugenholtz ed. *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management* (The Hague, London, Boston: Kluwer Law International, 2000) 7-57, at 45.

worthwhile, at this point, to set out Article 27(2) of the *Universal Declaration of Human Rights*, which provides as follows:

> Everyone has the *right* to the protection of the *moral...interests* resulting from any scientific, literary or artistic production of which he is the *author*.[115] (emphasis supplied).

States have always maintained full sovereignty to decide whether and how to implement their international obligations in the national legal order. The moral rights of authors form part of the rights of human beings which member states of the *UN Declaration* are required to observe. Modern protection of moral rights by countries, especially in the common law world, does not conform to Article 27(2) of the UN Declaration. The question is: *Why have member states of the UN Declaration failed to incorporate moral rights protection in their fundamental human right statutes*? I cannot pretend to know the answer. But, I can postulate that the traditional notion of property right (in this case intellectual property right) under common law continues to prejudice the notion of moral rights as human rights. Simply put, the prevailing influence of the common law has not been positive, but rather has hindered the growth of moral rights as human rights. This serves as a drawback and unless it is resolved, it will be very difficult to succeed in recognising moral rights as human rights. As Lea succinctly argues, "there is the fundamental 'clash of thinking' in trying to assimilate what are, in essence, human

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[115] The two provisions of Article 27 of the UN Declaration are incorporated in Article 19 of the *International Covenant on Civil and Political Rights* and Article 15 of the *International Covenant on Economic, Social and Cultural Rights*.

rights into a system grounded in commercial property law..."[116] In my opinion, we should be careful not to allow property concepts to obscure the human rights nature of moral rights.

Incorporating moral rights protection into the mainstream worldwide human rights protection will create a favourable attitudinal consciousness and eventually pave way for moral rights to be recognised as human rights of authors in national legislation. Now, trampling on people's rights, such as their dignity, freedom, and so forth, is reprehensible, and has generated a sense of worldwide condemnation. With the internet exposing authors' work to every Tom, Dick, and Harry, that sense of respect and recognition of moral rights (inspired through education) will enable authors' moral rights to be respected. Although this will not change the infringement of moral rights on the internet overnight, it will become a starting point for future recognition.

History tells us that, about thirty years ago, most states and individuals justified routine violations of human rights by appealing to national security and cultural relativism. Today, only a few states and individuals publicly justify systematic denials of nationally and internationally recognised human rights. This is a clear manifestation of how human beings respond to human rights education. At a later point in time, countries will begin to accept the need to protect the moral rights of authors under their human rights statutes. In addition, there is a dearth of judicial decisions on the issue of treating moral rights as fundamental human rights. A positive education can reverse this trend and pave the way for judicial activism in the quest for moral rights to be recognised as an aspect of fundamental human rights.

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[116] Lea, *supra* note 69, at 91.

Some commentators[117] have vehemently argued against the validity of Article 27 of the *UN Declaration*, which basically recognises copyright, among other intellectual property rights, as a universal human right. They argue that the declaration of intellectual property as universal human rights is problematic in that it is incompatible with other important goals, particularly the promotion of human physical well-being under Article 25(1) and the right to information under Article 19 of the same *Declaration*. I concur with the criticism levelled against *only* the economic aspect of the provision. I disagree with extending the criticism to the moral rights protection aspects of the provision. Ostergard, in arguing against Article 27(2), fails to distinguish between the economic and moral aspects of the provision.[118] Such an oversight cannot be countenanced, because while it is foreseeable that viewing economic rights of copyright owners as fundamental human rights could raise tough barriers to commodity access that would improve the physical well-being of people, the same cannot be said of moral rights. This distinction is not only necessary but also crucial for the debate. As suggested elsewhere[119], I concur that economic rights of creators of intellectual objects must not be recognised as fundamental human rights. However, my contention is that the moral rights of authors should be given such recognition. Further, I believe incorporating moral rights awareness in the mainstream human rights education will place them at a respectable position to

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[117] See for example, Ostergard, *supra* note 96, Ch.1; Phillips, Durie and Karet, *supra* note 24, at 11.

[118] Ostergard, *ibid.* at 29-30.

[119] See my "Achieving Economic Growth under the New Partnership for Africa's Development: Developing Countries' Quest for Flexible Patent Regime."

survive the current online onslaught.

E. WHY SHOULD MORAL RIGHTS BE TREATED AS FUNDAMENTAL HUMAN RIGHTS?

One may ask the question: *Why should moral rights be considered as fundamental human rights at all*? Before answering the question, it is imperative that I consider the basis upon which human beings are accorded human rights protection. Human beings are protected against violations of their personal rights, such as right to human dignity, right against destruction of one's property, right of liberty, freedom of conscience and expression, in order to give them a choice and to secure the exercise of their free will. Others have also sought to justify human rights by appeal to single ideals such as equality, autonomy, human dignity, and so forth.[120] Therefore, treating moral rights of authors as human rights suggests that they attach to particular individuals who can invoke them, that they are of high priority, and that they must be complied with.[121]

To this effect, the discussion of the requirement of originality becomes handy. The question is: What does the originality requirement do in justifying the human rights nature of the rights called "moral rights"? As indicated earlier, "originality" involves the exercise of skill, knowledge, judgment, selection from among options, and it is the product of the exercise of one's choice or free will. This makes my argument for moral rights of authors to be recognised as human rights to be in line with the thinking that underlies our recognition of most political, economic and legal rights i.e. to respect

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[120] See Andrew Fagan, "The Internet Encyclopedia of Philosophy: Human Rights" available at http://www.iep.utm.edu/h/hum-rts.htm (last date accessed: 09/09/04).

[121] *Ibid.*

human choices and the exercise of free will. Therefore, the moral interest of an author that represents an expression of her free will or choice in a work must be respected as human rights, unless there is a justification to the contrary. Based on this connection, I submit that the declaration of moral interest of authors as human rights under the *UN Declaration* is proper. Therefore, any act or omission that constitutes mutilation, distortion, or alteration of moral rights to the prejudice of the honour, dignity, and reputation of the author is reprehensible.

Moreover, the discussion under Section B above highlights those rights that stand out as moral rights. These rights include paternity, integrity, disclosure and attribution, and they are protected to secure the bond between an author and her work. By their very nature, moral rights are not different from most personal rights respected as fundamental human rights under many international treaties such as right to human dignity, right against destruction of one's property, right of liberty, freedom of conscience, and so forth. In my view, moral rights are personal rights of an individual as expressed in the work and must be inviolable. As Vaver points out, an author's work is an extension of her personality, and that any assault on it is as much a metaphorical attack on the author as a physical assault.[122]

In the light of this, treating moral right as fundamental authorial rights is not something unprecedented. Moral rights are essentially an incident of individual's liberty, honour, and dignity as expressed in the work. I suggest that moral rights of authors fall within the specie of rights recognised as human rights and must be respected as such. Therefore, any act or omission of users of copyrighted materials that distorts, mutilates

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[122] Vaver, *supra* note 80, at 158.

and prejudicially impinges upon the moral rights of authors of copyrighted works must not be countenanced, because that is an attack on the author's dignity as expressed in her work.

However, I will admit that treating moral rights as human rights does not mean that violations of moral rights must necessarily be viewed with the same concerns as violations of other human rights. I would rather have someone mutilate my work, than have someone mutilate me. My argument is that we must take moral rights seriously, and not dismiss them as a sort of useless civilian parasite on economic rights.

Including moral rights explicitly in the worldwide human rights protection will be promoting three objectives. First, it will ensure member states' compliance with their international obligation under the *UN Declaration* or any other in order to ensure respect for the integrity of creative endeavours and to preserve the human rights of authors. It will also provide an impetus to provisions enshrined in other human right treaties, such as Article 19(3) of the *Covenant on Civil and Political Rights*, which provides for the respect of the rights or reputations of others. Second, it will safeguard the authors' personality against worldwide onslaught on the internet through the creation of moral and conscious awareness about moral rights. This requires training, dissemination, and information efforts aimed at building and moulding of attitudes to strengthen respect and understanding for moral rights. Third, and most importantly, it will protect the public interest against counterfeit products and consumption risks, and in the same vein its right to enjoy the internet as a medium of freedom. In my view, recognising moral rights as human rights does not pose any threat or any limitation to public access or use. All that such recognition will do is to re-affirm the traditional Berne paternity and integrity rights.

This will in turn safeguard the interest of the public in the type of materials they consume over the internet.

CHAPTER THREE

EXISTING STATUTORY MORAL RIGHTS PROTECTION IN THREE COMMON LAW JURISDICTIONS[123]

Before proceeding to consider the existing moral rights protection regimes in the US, Canada, and the UK, it is instructive to consider the international forces that have shaped moral rights protection in these jurisdictions.

i. The Berne Convention

The oldest international copyright treaty, which serves as the bedrock of modern moral rights protection, is the *Berne Convention*. Article 6*bis* of the *Berne Convention* provides (under the heading "Contents of the Moral Rights") as follows:

> paragraph (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.
> Paragraph (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
> Paragraph (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

This Article provides many lessons. The first paragraph provides for paternity right, which can even be negatively exercised by publishing the work under a pseudonym

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[123] See Appendix I for a table comparing the moral rights protection regimes in Canada, the US, and the UK.

or by keeping it anonymous, with an option for the author to change his mind. Also, the author has a right to object to any distortion, mutilation, modification, or other derogatory action respecting the work which would prejudice her honour or reputation. For example, a person permitted to make use of a work may not change it by deletion or by making additions. This emphasises that moral rights exist independently from economic rights. A country may legislate that the moral rights can neither be assigned nor waived.[124]

The second paragraph provides that moral rights may be protected even after the author's death. The use of the phrase "at least" creates a minimum obligation and does not stop a country from providing for perpetual protection of moral rights. An exception is created to allow those countries whose legislation prior to ratification of or accession to the *Berne Convention* did not provide for protection after the death of the author. The third paragraph deals with the means by which an aggrieved author can seek redress for breaches of moral rights.[125]

Dworkin notes that there is a fundamental problem with the soft wording[126] of Article 6*bis*, since it does not force countries to have express moral right provisions, and tacitly acknowledges that the protection offered at common law and equity was adequate

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[124] Such example can be found in the *French Intellectual Property Code*, Article L. 121-1; German *Copyright Law*, 1965. Further, the debate in favour of including "the right of divulgation"under paragraph 1 could not prevail, and was dropped. But under Article 12–2 of the French Code, recognition is given to the author's right to decide whether or not to disclose her work to the public.

[125] See the *Guide to the Berne Convention*, (Geneva: WIPO, 1978), at 43-44.

[126] Referring to the fact that the Article was not couched in robust and stringent language.

for the purpose of the *Berne Convention*.[127] In effect, he argues that every government more or less remains the master of its own legislation and can decide not to pass any domestic legislation to implement the provision. I disagree. Besides being problematic, it is my view that a critical reading of Article 6*bis* discloses that Member countries are expected to adopt express legislative initiative to fully comply with the Berne provision. My position is buttressed by the wording of Article 6*bis*, which sets a minimum standard by introducing *only* two savings or grounds for exception: that certain countries may limit the paternity right and the right of integrity to the lifetime of the author; and that redress is a matter for national treatment.[128] Therefore, any act or omission that fails to satisfy the minimum standard could at best be considered inadequate. Because if the *Berne Convention* did not want member countries to have express moral rights provision in domestic legislation, it could have stated so expressly.

Having examined Member countries' international obligations under the *Berne Convention*, I now proceed to examine the moral rights protected in the statutory regimes of three common law jurisdictions – Canada, the United States, and the United Kingdom.

A. *CANADA*

Canada can claim credit for being one of the earliest common law countries to

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[127] Gerald Dworkin, "Moral Rights in Common Law Countries" in Cees van Rij (ed.), *Moral Rights* in I.A.E.L (Netherlands, Belgium: MAKLU Publishers, 1995) 37-55 at 39.

[128] See Mike Holderness, "Moral Rights and Authors' Rights: The Keys to the Information Age" (1998) 1 *The Journal of Information, Law and Technology*, available at http://elj.warwick.ac.uk/jilt/infosoc/98_1hold/holder.htm (last date accessed: 09/09/04).

recognise moral rights. Statutory protection has existed for the past 73 years.[129] The current *Copyright Act* contains moral rights provisions moulded as an attempt to fulfil Canada's international obligations under the *Berne Convention*. Vaver identifies three moral rights protected under sections 14.1(1) and 28.2 of the Copyright Act as: the rights of attribution (paternity), integrity, and association.[130] The *Act* provides as follows:

> 14.1(1) The author of a work has, subject to section 28.2, the right to the integrity of the work and...the right...to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.
>
> 28.2(1) The author's right of integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author, (a) distorted, mutilated or otherwise modified; or (b) used in association with a product, service, cause or institution...

There are available means of redress to safeguard moral rights under the Act. Under the Act, a violation of moral rights occurs where any act or omission is done

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[129] Canada ratified the Rome Act, 1928, of the *Berne Convention*, which first introduced moral rights, on August 1, 1931. But, prior to that certain provisions protective of non-economic interests of authors were included in the federal Criminal Code (see *The Criminal Code Amendment Act, 1915, S.C. 1915, c. 12 (5 Geo. V. c. 12)*): Part VI ss. 317- 334, Part VII ss. 344-398. In spite of Canada's long recognition of moral rights protection, the dominant forces that have shaped Canada's copyright regime have been economic. This is evident from a Canadian government report on the revision of copyright, "[o]wnership is ownership is ownership. The copyright owner owns the intellectual works in the same sense as the landowner owns land.": Canada, Sub-Committee on the Revision of Copyright, *A Charter of Rights for Creators* (Ottawa: Standing Committee on Communications and Culture, 1985), at 9. In other word, although Canada is bi-juridical, the civil law has not significantly influenced the copyright regime in Canada.

[130] Vaver, *supra* note 80, at 158.

contrary to any of the moral rights in the absence of consent by the author.[131] For instance, in the leading Canadian case of *Snow v. The Eaton Centre Ltd.*[132], an action was brought for the removal of the decoration of Snow's sculpture of 60 geese with ribbons in celebration of Christmas. The trial judge agreed that the attachment of the ribbons to the work of the plaintiff were prejudicial to his honour and reputation. The judge indicated that the words "prejudicial to his honour or reputation" in the *Act* involve a certain subjective element or judgment on the part of the author so long as it is reasonably arrived at.[133] According to Denault J., in determining what constitutes reasonableness some expert evidence may be required as well.[134] Further, O'Brien J. rejected the defendants' contention that section 12(7) (now section 28.2 above) of the Canadian *Copyright Act* should be looked at in a manner similar to a libel or slander action. In the opinion of O'Brien J., "the section [s.12(7)] gives rights greater than those based on libel or slander.[135]

Discussion of the remedies for the violation of moral rights is outside the scope of this paper. However, it suffices to indicate that the court may grant remedies by way of injunction, damages, accounts, delivery up, and so forth.[136] Another important point is

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[131] The Canadian *Copyright Act*, section 28.1.

[132] (1983) 70 C.P.R. (2d) 105 (Ont. H.C.) (*Eaton's Case*), O'Brien J.

[133] *Ibid.* at 106.

[134] *Prise de parole Inc. v. Guerin, editeur Ltee* (1997), 104 F.T.R. 104 (T.D.), Denault J.

[135] *Ibid.*

[136] Canadian *Copyright Act*, section 34(2); See also, Emma A.C. Grell, "Civil and Criminal Remedies for Copyright Infringement", in Gordon F. Henderson (ed.) *Copyright and Confidential Information Law*

that, Canada's statutory protection of moral rights allows the owner to exercise the prerogative of waiver, but cannot assign these moral rights.[137] Lastly, under section 14.2(1) of the Act, the term of moral right protection is the same as that for economic rights.

One unsettled issue in Canadian law concerns the persons and creative products that receive moral rights protection. Since an author of a work under the *Copyright Act* does not include performers, sound recording makers and broadcasters, holders of neighbouring rights have no moral rights protection under the Act.[138] Currently, consideration is being given to a proposal to grant protection to moral rights of performers in Canada.[139] This is an attempt to fulfil Canada's obligation under the *WIPO*

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of Canada (Toronto: Thomson Professional Publishing, 1994), 311-323.

[137] Section 14.1(2). This is the same in the UK. See sections 87 and 94 *CDPA*.

[138] Vaver, *supra* note 80, at 158, suggests that upon Canada's ratification of the *WIPO Performances and Phonograms Treaty*, 1996, such protection must be recognised. A contrary view is held by Sanderson, who in relying on the Canadian case of *Fly By Nite Music Ltd. v. Record Warehouse Ltd.*, [1975] F.C. 386, 20 C.P.R. (2d) 263, argues that "[a] work is not defined in the Act. Case law has defined a work broadly to include any type of work, for example a sound recording would be considered a work." He therefore argues that holders of neighbouring rights in Canada can receive moral rights protection. Paul E. Sanderson "Canada" in Cee van Rij (ed.), *Moral Rights* in I.A.E.L (Netherlands, Belgium: MAKLU Publishers, 1995), 59-64, at 59. In my view, Sanderson appears to be stretching the judicial definition of a "work", in the *Fly By Nite Music Ltd* case, too far.

[139] See http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/statusreport.pdf/$FILE/statusreport.pdf (last date accessed: 10/10/04).

Performances and Phonograms Treaty, 1996.

Article 5(1) of the *WIPO Performances and Phonograms Treaty*, provides that "[i]ndependently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances...and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation." Upon Canada's ratification of this treaty, statutory amendment will be required to give recognition to moral rights for performers.[140] It is instructive to note that the treaty falls short of providing moral rights protection for holders of other neighbouring rights. In my view, the exclusion of broadcasters and the makers of sound recordings from the ambit of the provision is unfortunate. There is the need to maintain consistency across the board.

B. ***THE UNITED STATES***

The US, despite its accession to the *Berne Convention*, continues to rely mainly on the common law to protect the moral rights of authors.[141] The *Visual Artists Rights*

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[140] It is worthwhile to point out that the signature of this treaty (like any other treaty signed by a government) signals the government's commitment not to derogate from the principles embodied therein. See *A Framework for Copyright Reform* issued by the Intellectual Property Policy Directorate, Industry Canada — June 22, 2001, at 5.

[141] The US Congress was persuaded that judicial recognition of moral rights under the *Lanham Trademark Act*, 15 U.S.C. ss. 1051 - 1127 (1994), and cases such as *Gilliam v. American Broadcasting Companies Inc.* (1976) 538 F. 2d 14, *per curiam*: made it unnecessary to enact express provisions that mirrored Article 6*bis* of the *Berne Convention*. This case is an authority for the proposition that adequate legal protection (through the court) will be provided to artists in society to

Act, 1990 (*VARA*)(inserted in the *US Copyright Act*, 1976, as section 106A) was enacted to afford a limited protection to the moral rights of artists. These moral rights of artists recognised in the US are the rights of attribution, paternity and integrity. Section 106A of the Act provides:

> ... the author of a work of visual art –
> (1) shall have the right –
> (A) to claim authorship of that work, and
> (B) to prevent the use of his or her name as author of any work of visual art which he or she did not create;
> (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honour or reputation...

The limited protection of moral rights granted to artists under section 106A of the Act is further subject to the requirement that if the work of visual art is more than one copy, and not under any circumstance exceeding 200 copies, then the author must *sign* and *consecutively number* them, failing which protection shall be denied. Gendreau points out that "...a U.S. author [artist] who forgets to number his limited edition of 150 prints waves goodbye to the moral rights protection of the Copyright Act."[142] In my view,

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encourage production and dissemination of work to the public. Therefore, an act or omission (in this case unauthorised editing of plaintiffs' program) that distorts or mutilates the plaintiff's work is actionable. It is still not clear why the US Congress passed the *VARA* when it had earlier insisted that no steps were necessary for compliance with *Berne*. Holderness, *supra* note 125, postulates that the fact that the US was at the time on the brink of trade war with China over allegations of mass violation of software copyrights may well have been significant. Thus, the *VARA* was passed to placate those who thought the US had not honoured its Berne commitments.

[142] Ysolde Gendreau, "Intention and Copyright Law" in Frederic Pollaud-Dulian (ed.), *Perspectives on Intellectual Property: The Internet and Authors' Rights* (London: Sweet & Maxwell, 1999) 5

the U.S. approach of limited statutory protection of moral rights – leaving the bulk of protection to common law – does not satisfy Berne requirements.

Vaver expresses his concerns about leaving the bulk of moral rights protection to common law as follows: "The United States has not explicitly extended moral rights beyond the visual arts field. It nevertheless claims to comply with its Berne obligations, mainly through the protection extended to all authors by the common law and by state and federal false advertising laws. *Were this true, it is hard to see why enactment of the Visual Artists Rights Act was thought necessary, and why it was not made applicable to all works.*"[143] Under Article 6*bis* of the *Berne Convention*, Member countries are expected to take domestic legislative initiatives to implement the Berne provision. Moreover, the requirement of numbering violates the ban on formalities introduced by the *Berne Convention* under its Article 5(2).

The scathing criticisms against the US approach in the purported implementation of the *Berne Convention* under common law led to the creation of another international copyright convention (the *UCC*) that would be better suited to the US. Needless to say, moral rights are given no formal recognition under the *UCC*.[144] In my view, the

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1-22, at 10.

[143] David Vaver, "Canada's Intellectual Property Framework: A Comparative Overview" (2004) 17(2) I.P.J. 125-188, at 155 (emphasis added).

[144] Gendreau, *supra* note 21, at 166. The absence of moral rights recognition under the *UCC* has not prevented Dietz from concluding that some moral rights principles are reflected in some provisions of

subsequent introduction of the *UCC* was aimed at persuading the US to sign on to the *Berne Convention*.

C. *THE UNITED KINGDOM*

Until 1998, the idea of creating a right dependent on the relationship between an author and her work in the UK was regarded with some scepticism.[145] However, the current level of statutory recognition of moral rights in the UK is comparatively greater than in the United States, where as we have seen moral rights are barely recognised. In the UK, the *Copyright, Designs and Patents Act*, 1988 (*CDPA*)[146] protects paternity rights[147], integrity rights[148], rights against false attribution[149], and a limited right against divulgation of certain photographs and films.[150] The key portions[151] of the *CDPA* are as

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the Convention: A. Dietz, "Elements of Moral Right Protection in the Universal Copyright Convention" (1987) 21 *Copyright Bulletin* no.3, at 17.

[145] Phillip, Durie and Karet, *supra* note 24, at 58.

[146] The *CDPA* applies to the whole of the United Kingdom comprising: England and Wales, Scotland and Northern Ireland. The extent and application of the various Parts of the English Act is confirmed under sections 157, 207 & 255 of the *CDPA*.

[147] *CDPA*, section 77.

[148] *Ibid.* section 80.

[149] *Ibid.* section 84. Treating the right against false attribution as moral right is not a Berne requirement. It is the result of the prevailing influence of the common law of defamation.

[150] *Ibid.* section 85.

[151] The length of the provisions granting statutory protection to these moral rights of authors under the English *CDPA* will not warrant their full reproduction here. See appendix II.

follows:

> 77(1) The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work in the circumstances mentioned in this section; but the right is not infringed unless it has been asserted[152] in accordance with section 78.
>
> 80(1) The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right...not to have his work subjected to derogatory treatment.
>
> ... ...
>
> (b) the treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director;...
>
> 84(1) A person has the right... –
> (a) not to have a literary, dramatic musical or artistic work falsely attributed to him as author, and
> (b) not to have a film falsely attributed to him as director;...
>
> 85(1) A person who for private and domestic purposes commissions the taking of a photograph or the making of a film has...the right not to have – (a) copies of the work issued to the public, (b) the work exhibited or shown to in public, or (c) the work broadcast or included in a cable programme service;...

Additionally, these moral rights under the *CDPA* are coupled with the right of waiver and are subject to numerous permitted exceptions; but these moral rights can never be assigned.[153] However, the problem associated with section 77 is that the enjoyment of paternity right is subject to a requirement of prior assertion by notice before it becomes effective.[154] According to Gendreau, "[t]here does not seem to have been any

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[152] Canada, unlike the US and the UK, does not impose any formal requirement before granting protection to moral rights.

[153] *CDPA*, section 94. Same as in Canada: Section 14.1(2).

[154] Section 78 of the *CDPA*: "(1) A person does not infringe the right conferred by section 77 (right to be identified as author or director) by doing any of the acts mentioned in that section unless the right has

outcry at the imposition of formalities when moral rights were introduced in the [*CDPA*]...[T]he author cannot enjoy part of his rights: the paternity right...needs to be

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been asserted in accordance with the following provisions so as to bind him in relation to that act.

(2) The right may be asserted generally, or in relation to any specified act or description of acts—

(a) on an assignment of copyright in the work, by including in the instrument effecting the assignment a statement that the author or director asserts in relation to that work his right to be identified, or

(b) by instrument in writing signed by the author or director.

(3) The right may also be asserted in relation to the public exhibition of an artistic work—

(a) by securing that when the author or other first owner of copyright parts with possession of the original, or of a copy made by him or under his direction or control, the author is identified on the original or copy, or on a frame, mount or other thing to which it is attached, or

(b) by including in a licence by which the author or other first owner of copyright authorises the making of copies of the work a statement signed by or on behalf of the person granting the licence that the author asserts his right to be identified in the event of the public exhibition of a copy made in pursuance of the licence.

(4) The persons bound by an assertion of the right under subsection (2) or (3) are—

(a) in the case of an assertion under subsection (2)(a), the assignee and anyone claiming through him, whether or not he has notice of the assertion;

(b) in the case of an assertion under subsection (2)(b), anyone to whose notice the assertion is brought;

(c) in the case of an assertion under subsection (3)(a), anyone into whose hands that original or copy comes, whether or not the identification is still present or visible;

(d) in the case of an assertion under subsection (3)(b), the licensee and anyone into whose hands a copy made in pursuance of the licence comes, whether or not he has notice of the assertion.

(5) In an action for infringement of the right the court shall, in considering remedies, take into account any delay in asserting the right."

asserted..." in a prescribed manner.[155] Holderness aptly writes: "the [paternity] right applies only where it has been asserted in writing in the work or in an assignment or licence covering the work."[156] As he did against the U.S. numbering requirement, Gendreau criticises this as putting greater constraint on the author than a requirement to register as a condition for bringing an action, for it targets the very existence of the right at stake.[157]

According to Gendreau, the requirement that authors must assert their paternity right under section 78 of the *CDPA* goes beyond merely putting up a notice to claim paternity right in their works. Rather, it bears much resemblance to the requirement of copyright notice as a *sine qua non* for copyright protection.[158] This obviously is not consonant with the ban on formalities imposed by Article 5(2) of the *Berne Convention* which applies to both moral and economic rights. The last observation respecting moral rights under sections 77 (paternity right), 80 (integrity right) and 85 (right of divulgation) of the *CDPA* is that they subsist so long as copyright subsists in the work; but the right against false attribution continues to subsist only for 20 years after a person's death.[159] The term of protection for moral rights in the UK is similar (in part) to the prevailing situation in Canada.

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[155] Gendreau, *supra* note 142, at 9.

[156] Holderness, *supra* note 128.

[157] Gendreau, *ibid.*

[158] *Ibid.*

[159] *CDPA*, section 86.

It is apparent, then, that the acceptance of statutory protection for moral rights has been a bitter pill to swallow in the U.S., the UK, and Canada. The traditional challenge facing the protection and enforcement of authors' moral rights has been the lukewarm reception which common law countries have accorded such rights in their domestic legislation. Pollaud-Dulian sums it up: "The moral right of the author remains an open issue: while commonly perceived as a basic right in civil law countries, it is still widely misunderstood and rejected in 'copyright' countries."[160] There is a body of opinion[161] in many common law countries, such as the US, that they are living up to expectation in ensuring compliance with Article 6*bis* under common law and other provisions. But, as Dworkin argues, no common law country, without express moral rights provisions, lives up to that Article adequately.[162] In the light of my proposed-protective regime[163], even those common law countries, such as Canada and the UK which grant statutory protection to moral rights need reform.

Furthermore, the meagre success in ensuring statutory protection of moral rights is now threatened more than ever by internet technology. Some think that the very act of posting copyrighted materials on the internet includes an authorisation to use the work in any fashion, including trampling on the author's moral rights. Moral rights are not

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[160] Pollaud-Dulian, *supra* note 25, at vi.

[161] See Vaver, *supra* note 143, at 155.

[162] See Dworkin, *supra* note 127, at 47.

[163] See Chapter Two, *supra* [Arguing for moral rights to be treated as fundamental human rights of authors].

waived by merely posting copyrighted work on the internet.[164] In my view, the proposition that there is no ownerless copyright still holds true.[165] Hence, the counter argument is that moral rights subsist in the work insofar as the statutory term of protection granted to the work has not expired.[166] Next, I shall examine the challenges presented by the internet to moral rights protection and enforcement.

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[164] See Gendreau, *supra* note 142, at 13: "The circumstances in which a waiver can be implied would thus have to be such that the inference is ineluctable...that works are protected unless the desire not to enforce the copyright is absolutely unequivocal."

[165] Copyright laws provide for the protection of anonymous works and create presumptions in favour of copyright ownership – see for example, the Canadian *Copyright Act*, 1985 R.S.C., c. C-42 sections 6.1 & 34.1.

[166] In some jurisdictions, such as Canada, moral rights can impliedly or expressly be waived, but assignment is not by itself a waiver. See *Copyright Act*, section 14.1(2)(3). For example, in the *Berlin Wall Painting* Case, (1997) IIC 282, the German Supreme Court refused to see an implied waiver in the fact that the authors of the wall pictures, which were in the public view, could not have expected that their creations would one day have commercial value.

CHAPTER FOUR

CHALLENGES FACING MORAL RIGHTS PROTECTION IN THE INTERNET AGE

> Since we don't have a solution to what is a profoundly new kind of challenge, and are apparently unable to delay the galloping digitisation of everything not obstinately physical, we are sailing into the future on a sinking ship. This vessel, the accumulated canon of copyright...law, was developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry. It is leaking as much from within as without.
> Legal efforts to keep the old boat floating are taking three forms: a frenzy of deck chair arrangement, stern warnings to the passengers that if she goes down, they will face harsh criminal penalties, and serene, grassy-eyed denial.
> [Copyright] law cannot be patched, retrofitted, or expanded to contain the gases of digitised expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum. (Which, in fact, rather resembles what is being attempted here.) We will need to develop an entirely new set of methods as befits this entirely new set of circumstances.[167]

A. INTRODUCTION

Barlow's illuminating observations have particular relevance to attempts by the legal community to tackle the unique challenges presented by the internet to online moral rights protection, without defeating the fundamental social policy objective underpinning copyright. As technologies progress, the need to protect them becomes even more daunting. The challenges posed by the internet to moral rights of authors are twofold: technological and legal.

Over the years, copyright law has been one of the legal devices developed to recognise the value in intellectual creativity and also to promote widespread of ideas to

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[167] John Perry Barlow, "Selling Wine Without Bottles: The Economy of Mind on the Global Net" in P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment* (The Hague, London, Boston: Kluwer Law International, 1996) 169-187, at 169-170.

ensure further creativity by others. Copyright law, until recently, has survived all the ravages of technology, which could be employed to infringe the rights of an author. The internet has become an economically efficient medium for authors to reach the world market and to utilise new distribution tactics.[168] However, when authors use the internet and digital technologies, their works become vulnerable to piracy.[169] The technological change presented by the internet indeed threatens a *coup de grace* to traditional copyright enforcement. Sykes put it succinctly as follows: "[t]echnological change [i.e. internet technology] has made it quicker and easier to make copies of works regardless of whether they are protected by the law or not. The practical value of legal remedies is undermined to the extent that digital copying is diffuse and difficult to detect. If *de facto* protection works, *de jure* protection and its limits seem not to matter very much."[170] Gone are the days when we mainly considered commercial entities as the sole enemies of copyright regimes and viewed the activities of individuals in their rooms and offices with little

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[168] Brian Paul Menard, "And the Shirt Off Your Back: Universal Studios, DECSS, and the Digital Millennium Copyright Act" (2001) Vol. 27 Rutgers Computer &Tech. L. J. 371-408 at 372; Jennifer Burke Sylva, "Digital Delivery and Distribution of Music and Other Media: Recent Trends in Copyright Law; Relevant Technologies; and Emerging Business Models" (2002) 20 Loy. L. A. Ent. L. Rev. 217 at 218 - 219. See also Ku, *supra* note 66, at 264.

[169] Menard, *ibid.*

[170] Sykes, *supra* note 110, at 11. Also, in an illuminating article by Alex Colangelo entitled, "Copyright Infringement in the Internet Era: The Challenge of MP3s" (2002) Vol. 39 Alberta L. Rev 891-913, he points out that the advent of new technologies, such as the internet networking, has greatly expanded the ease with which copyright is infringed without detection.

concern. Now, the scenario is different because the internet is a gigantic photocopier in those very rooms and offices. The focus is everywhere in attempting to detect infringers, because we are all potential infringers; even in our bedrooms. Copyright infringers are all around us. Indeed, we may be copyright infringers ourselves.

Next, I shall examine (B) the birth of the internet and the rate at which it is growing in relation to its daily usage. Following this discussion, I shall consider the implications of internet technologies: (C) the vulnerabilities of the species of moral rights to infringement; and (D) some legal and practical difficulties besetting attempts to remedy moral rights infringements.

B. THE BIRTH OF THE INTERNET

I cannot proceed with this discussion without first asking the question: *What is the internet?* Street and Grant describe the internet as a loose collection of millions of computers at sites throughout the world that share information and files.[171] To Lawrence, the internet is a network of computers that communicate with each other through the telephone system.[172] Sometimes the internet is used interchangeably with the word "cyberspace."[173]

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[171] Lawrence Street and Mark Grant, *Law of the Internet* (Charlottesville, Virginia: Lexis Law Publishing, 2000), at their introduction xxx.

[172] Penelope Lawrence, *Law on the Internet: A Practical Guide*, (London: Sweet & Maxwell, 2000), at 5.

[173] However, as Schelling, *Cyberlaw Canada: The Computer User's Guide* (Canada, US: Self Counsel Press, 1998), points out in the introductory chapter of his book that "cyberspace" encompasses much more than just the internet. It includes the World Wide Web, the internet bulletin boards, and anything else that lies beyond the computer keyboard. For the purposes of this discussion the internet includes

The internet, serving as today's version of information superhighway, began in the late 1960s[174] as a medium to link various US military, industrial, and academic research partners. Over the past few years, the internet has become a communication channel for millions of people and businesses. Takach remarks that e-mail continues to embed itself into the routine of everyday life. He further notes that "currently, about 10 billion - that's right, *billion* - email messages are sent a day."[175] As an intricate web of the computer, huge volumes of data can be stored and transmitted over the internet. This phenomenon has been nothing short of momentous in that the result is a platform for the new "network intelligence" that permits millions of people to communicate as never before with like-minded counterparts.[176]

The size of this phenomenon is difficult to gauge and cuts across national frontiers. According to Takach, it is really unknown, at any one time, precisely how many users are there on the internet. In fact, the internet is now a universal network of

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the World Wide Web.

[174] According to Lawrence, *supra* note 172, the internet emerged in the early 1960s in America by the Department of Defence to avert a possibility of a nuclear strike destroying essential military intelligence. This simple solution to a rather catastrophic scenario bred the germ that eventually developed into the internet.

[175] George S. Takach, *Computer Law* 2nd ed. (Toronto: Irwin Law, 2003), at xix [Takach].

[176] See D. de Kerckhove, *Connected Intelligence: The Arrival of the Web Society* (Toronto: Somerville House Publishing, 1997). Kerckhove further highlights the importance interactivity and hypertextuality in the context of the internet.

networks.[177] In the US case, *American Civil Liberties Union v. Reno*[178], the Court gave a perceptive analysis of the internet, including how it differs from earlier communications technologies such as books, newspapers, radio and television, and labelled the internet as a "unique and wholly new medium of worldwide human communication." The Court stated that "the internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks."[179]

Internet technology, even in its embryonic stage of advancement, provides wide and varied services. Today, one very common use of the internet is the operation of electronic mail services[180], whereby registered individuals can receive mail at their electronic mail boxes. By the click of a mouse, messages are transmitted through various channels for reception by the ultimate recipient. These transmissions are made possible as a result of standard protocol that places all information into small "data packets." Each data packet is individually addressed and is able to travel from its source to its intended destination through different routes. One commentator notes that even what seems to be a small piece of information, such as a brief e-mail message, is broken into smaller pieces

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[177] See *American Civil Liberties Union v. Reno* 929 F. Supp.824, at 830, which was affirmed by the U. S. Supreme Court (521 U. S. 844, 1997), *per curiam*. [hereinafter referred to as "the *ACLU* decision"].

[178] *ACLU*, *ibid.* at 844.

[179] *Ibid.* at 830.

[180] In a paper delivered on January 13, 2004 at the Faculty of Law, University of Alberta by Stephen Bilodeau (Alberta Justice) entitled "Cybercrime: When Computers Go Bad" (unpublished), the author at p.18 noted that, in 2000, 53 per cent of Canadians above the age of 15 used the internet.

and may travel individually through different routes called "packet switching."[181] Upon arrival, the packets are reassembled in the end-user's RAM, hard drive, or other storage device.[182] Electronic mails, like ordinary letters, may qualify as original literary or musical works, so that any unauthorised use of them constitutes a potential infringement.

What now appears to be the fastest growing dimension of the internet is the World Wide Web, which allows individuals and organisations to create Web sites - such as "www.padusei.ca"- for others to access information, here about Poku's Law Firm.[183] The World Wide Web's popularity is based on three reasons: first, its ability to distinguish between various file types such as text and images; second, it allows hypertext links; and third, it employs a Graphic User Interface accessible to the average computer user. Simply put, the World Wide Web is the largest encyclopaedia in the world and its largest shopping mall and largest games arcade.[184] Because the internet has changed and is changing the way our society works, copyrightable materials are now locatable on the internet. Kurz succinctly puts it thus: "[t]he internet is a unique medium in which copyright issues arise, as the types of works which may find their way onto the internet

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[181] See *infra* at p.113 for a diagram of a "packet switching".

[182] Gretchen M. Hoffmann, *Copyright in Cyberspace: Questions and Answers for Librarians* (New York, London: Neal-Schuman Publishers Inc., 2001), at 42 & 43.

[183] Except that in Ghana, unlike the US, Canada, and the UK, it is illegal for a practitioner to tout or advertise for clients under the *Legal Profession Act*, 1960(Act 32) and the *Legal Profession (Professional Conduct and Etiquette) Rules*, 1969. How these laws will apply when a Ghanaian Law Firm advertises on the internet is yet to be seen.

[184] Lawrence, *supra* note 172, at 7.

(and the copyright issues attendant to those works) are as varied as the universe of works which may be subject to copyright protection."[185] To prevent others from doing acts that infringe the rights of authors or to exercise the right to use these copyrighted materials is the source of tension between right holders and users of the internet.

C. MORAL RIGHTS AND THE INTERNET THREAT[186]

As a gigantic global communication network of networks, the internet presents opportunities for distributing, sharing and using intellectual property and knowledge assets. From Koepsell's perspective, "the internet has made the distribution of almost every sort of traditional expression both easy and prolific."[187] However, moral rights associated with copyrighted materials located on the internet are under greater threat than before as a result of the activities of infringers. Because of the internet, authors are unable to exercise effective control over their creative integrity, paternity right and their right of association (i.e. the three species of moral rights), and face a remedial nightmare when there is an infringement. Torremans laments that "[d]igital technology allows the copyist to make changes to the work with...ease. Deletions and alterations are easy to make and the copy will still have the appearance of an original...The same activities may also lead

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[185] Raymond A. Kurz, *Internet and the Law: Legal Fundamentals for the Internet User* (Rockville, Maryland: Government Institutes, Inc., 1996), at 6.

[186] This discussion must not be misconstrued as an attempt by the writer to advocate against technological development. But, while we acknowledge that technology is the life-blood of modern society, we cannot close our eyes to its negative effects, especially on our current copyright regime.

[187] David R. Koepsell, *The Ontology of Cyberspace: Philosophy, Law, and the Future of Intellectual Property* (Illinois: Open Court Pub., 2000), at 119.

to the deletion of the author's name, which may be replaced by another name, or the alterations to the work may, in extreme cases, be such that they lead to distortion or mutilation of the original work."[188]

The alteration of someone's copyrighted materials on the internet is one of numerous illegal activities that may be carried out across different borders. As Litman points out, authors can have their works undetectably altered on the internet, and there is no way to insure that the work being distributed over their name is the version they wrote.[189] Besides the difficulties in identifying infringers, there is also a public consumption risk which transcends national boundaries. The activities of hackers make it risky to even cite an online publication in an article.

Moreover, the name of the author can be deleted or the title altered online to the extent that the work attains a different status in the eyes of other online users across the globe. The threat is of a different order of magnitude from a situation where a book purchaser deletes the author's name or alters the title to the hard copy. In the latter case, the purchaser's personal property right is in issue, unless she decides to pass it on to the public under her new name or title.

In addition, when there is online compilation of different works, the dangers posed to authors' moral rights are innumerable. The traditional Berne paternity and integrity rights are less respected, if not relegated to the background, in the online compilation. Although the work may remain intact, the environment in which it is found

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[188] Torremans *supra* note 29, at 99.

[189] Litman, *supra* note 9, at 184.

can give the author cause for concern. For instance, a religious musical work could be used for an online advertisement for pornography. Should we expect the author to remain silent? The answer is, obviously, negative.

Now, when you take an online dissemination of artistic work, the problem of not recognising the artist's tiny-scribbled name or signature on the physical object further brings to the fore the threat to the paternity right of artists. Taking as an example from Francon's article[190]: consider an internet site opened by, let's say, the Alberta Provincial Museum, to disseminate cultural materials all over the world. The paternity right of the author of such an artistic work displayed on the site may come into play. Such networking puts the work into a digital form, by using techniques of translating its constituent analogue signal into a digital mode. This has the effect of blurring the lines between different kinds of digitised works. Such operations may also attack the artist's right of authorship; since other aspects of the internet could leave the author's paternity right unrecognised. Moreover, the environment in which the work is displayed or associated may kill the spirit of the work. There is a feature of the internet that encourage users themselves to make connections among different works by using hypertext, which links their respective authors might consider sacrilegious.

The destructive impact of the internet has prompted some writers, such as Lea, to argue that the whole concept of moral rights protection is unsustainable in the digital

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[190] Andre Francon, "Protection of Artists' Moral Rights and the Internet" in Frederic Pollaud-Dulian (ed.), *Perspectives on Intellectual Property: The Internet and Authors' Rights* (London: Sweet & Maxwell, 1999) Vol.5 at 75-85.

age.[191] I am, however, of the opinion that we should not throw up our hands in despair because of the threats confronting moral rights protection in the internet age. In my view, the problems the internet presents (like the problems presented by most technologies) may be temporary. Therefore, the search for answers must continue.

These threats add up to the marginalisation of traditional moral rights, and demonstrate that, with the internet, the authors of protected works have very many opportunities to complain of infringement of their moral rights. As shall be seen below, there are also identification and enforcement obstacles. With the internet, treating national boundaries with contempt, the author faces the unique challenge of locating a faceless infringer, who may move from country to country. The ramification of just a single act of distortion, modification or deletion of a copyrighted work on the internet is worldwide. Even in the unlikely event of finding an infringer, the author faces, *inter alia*, jurisdictional and choice of law challenges to moral rights enforcement. As mentioned elsewhere, copyright enforcement is based on the principle of territoriality. Since the internet treats national borders with contempt, it has rendered these traditional copyright principles somewhat pointless. How then is the rise of the internet impacting on these traditional paper-oriented copyright concepts and principles?

D. LEGAL CHALLENGES TO MORAL RIGHTS PROTECTION

With the advent of the internet and its ever-increasing activities, many traditional legal rules respecting moral rights protection are no longer effective to regulate intellectual property materials on the internet. According to Dratler "[t]he internet has become, for many, a free-speech forum that compares with the old Hyde Park free-speech

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[191] Lea, *supra* note 69, at 97.

forum in London as a jetliner to an ox cart."[192] It usually gets to a point where an online dispute that arises has no precedent(s), if not posing problems to precedents and there is always the temptation to put a square peg into a round hole. This sometimes enjoins the courts to use all necessary and available legal armoury (some of which is sometimes conjured) to resolve an otherwise uncompromising dispute in the eyes of the existing copyright laws.

This section attempts to grapple with issues of (1) jurisdiction, (2) choice of law, (3) evidence gathering, and (4) the problems related to the enforceability of copyright remedies in the internet age. One important point worth bearing in mind is that whatever is discussed below may apply *mutatis mutandis* to the other areas of IP law similarly affected by the internet. Moreover, occasional references may be made to other branches of the law as a means of elucidating and driving home my points. This is because, as Segkar rightly states, the serious questions as to the adequacy of the traditional legal framework in the light of the internet are broadly recurring in many different areas of the law.[193]

1. JURISDICTIONAL CHALLENGE

Although copyright law is increasingly driven by international concerns, it nonetheless has territorial application. The principle of geographical application of copyright law is the core foundation of copyright regimes in every country that is a member of the WTO, the *Berne Convention* or the *UCC*. One commentator captures it in

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[192] Dratler, *supra* note 12, at 1-24.

[193] Adeep Segkar, "The *Nasper* Decision - New Technology, Betamax VCRs and Music: A Copyright Critique" (2002) Vol. 9(3) Auckland U. L. Rev. 806-848, at 807.

these words: "[t]he signatory states undertake to enforce the articles of the treaties and secure copyright protection for the works of non-citizens, as long as the author has a personal connection with a member state or his/her work is first published there."[194] Therefore, authors who think their rights have been or are being infringed upon in another country may proceed to that other country to assert their rights based on its copyright law. Thus, copyright law is based on geographic communities, and that courts should take jurisdiction over the actions of an entity when the infringer and the infringement are both in the court's jurisdiction.[195]

Put differently, this principle of territoriality holds that a state has no competence to prescribe legal rules to govern activities that occur outside its national borders.[196] For example, a Canadian author whose moral right is infringed in Ghana must pursue that infringer according to Ghanaian law in a Ghanaian court. This jurisdictional rule was fashioned to handle situations where the perpetrator of an infringing act is physically present in the forum of the suit. For instance, if copyrighted work on the internet is altered in many countries all over the globe in a way that infringes the paternity right of the author, the question is: Which country has jurisdiction? The place where the infringer is based, or the state where the infringed copies are stored on a server, or the place where the infringed files are accessed from, and so on. According to traditional conflict of law rules, each of the states involved can assert jurisdiction based on lex loci delicti (the law

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[194] P. Eve Athanasekou, "Copyright in Cyberspace" available at <http://www.bileta.ac.uk/98papers/athenas.html> (Last visited: 30/09/04).

[195] Takach, *supra* note 175, at 648.

[196] Paul Goldstein, *International Copyright* (NY: Oxford University Press, 2001), at 63.

of the place where the tort or crime was committed), lex fori (the law of the forum), or lex domicilii (the law of domicile), etc. However, since there are no borders in cyberspace, the infringement would become a delicti in transit.[197]

Moreover, the rules were meant to deal with a situation in which infringers engaged in physical reproduction or communication of the work without the consent of the author. The advent of the internet makes the application of this physically-based legal rule virtually unworkable, since, as Takach puts it, the internet has no physical boundaries, and its communities are virtual rather than physical in nature.[198] Now, when one is online on the internet, one is everywhere simultaneously.[199] The question is whether the traditional territorial application rule can effectively apply to the internet that does not have any territory or boundaries? Even though the internet has not wiped away borders, it nonetheless allows borders to be crossed with great ease and quickly. The consensus is that traditional territorial protection for copyright will no longer be sufficient

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[197] See Athanasekou, *supra* not 194.

[198] Takach, *supra* note 175, at 648. See also D.R. Johnson and D. Post, "Law and Borders: The Rise of Law in Cyberspace" (1996) 48 Stan. L. R. 1367, argue that new laws are emerging to counteract the effects of the internet: "while these electronic communications play havoc with geographic boundaries, a new boundary made up of screens and passwords that separate the virtual world from the "real world" of atoms emerges. This new boundary defines a distinct Cyber-space that needs and creates its own legal institutions..." David Post, "How Shall the Net Be Governed"? available at <http://www.cli.org/DPost/governance.html> (Last visited: 31/03/2004).

[199] *ACLU*, 117 S. Ct. 2329, at 2334-2335.

to protect copyright.[200]

The threat to traditional rules of jurisdiction in copyright law caused by the ever-expanding flow of copyrighted materials online is one significant concern spawned by the internet. The jurisdictional crisis facing the courts as a result of the internet can be gleaned from a number of judicial decisions.[201] This jurisprudence has generated intense debates in academic circles as to how to develop appropriate jurisdictional rules to regulate situations of infringement of copyrighted materials on the internet.[202] The

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[200] Colangelo, *supra* note 170, at 894.

[201] See *Cybersell Inc. v. Cybersell Inc.*, 130 F. 3d. 414 (9th Cir. 1997), *per curiam*; *Giffert v. Strumpf*, 141 F.3d. 1149 (1st Cir. 1998), *per curiam*; *Panavision International, L. P. v. Toeppen*, 141 F. 3d.1316 (9th Cir. 1998), *per curiam*; *Maritz Inc. v. CyberGold Inc.*, *infra* note 208; *Inset Systems Inc. v. Instruction Set Inc.*, *infra* note 208; *Zippo*, *infra* note 206; *Bensusan Restaurant Corp. v. King*, *infra* note 208; *LICRA & UEJF v. Yahoo! Inc. T. G. I.*, available at <http://www.lapres.net/yahen.html> (France), Gomez J., cf *Yahoo*! Inc. v. LICRA, 169 F. Supp. 2d. 1181 (N. D. Cal. 2001), Fogel J. [hereinafter called the *Yahoo*! case(s)].

[202] See Darrel Menthe, "Jurisdiction In Cyberspace: A Theory of International Spaces" (1998) Vol. 4 Mich. Telecomm. Tech. L. Rev. 69 available at<http://www.mttlr.org/volfour/menthe.html> (last visited: 30/03/04); Warren B. Chik, "U. S. Jurisdictional Rules of Adjudication over Business Conducted via the internet - Guidelines and a Checklist for the E-Commerce Merchant" (2002) Vol.10 Tul. J. Int'l & Comp. L. 243; Michael A. Geist, "Is There a There There? Toward Greater Certainty for Internet Jurisdiction"(2001) 16 Berk. Tech. L. J. 1345 available at <http://arxiv.org/ftp/cs/papers/0109/0109012.pdf> (last visited on 31/03/2004); Richard S. Zemberk, "Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace" (1996) Alb. L. J. Sci & Tech. 339, advances for the adoption of legal paradigms based on a constitutional due process analysis to solve jurisdictional conflicts arising from an electronic act committed over the

traditional approach to copyright enforcement – where a state makes its law apply to the activities, relations or the interest of a person in things[203] – stands on a fragile foundation. Currently, consideration is also being given to what Menthe refers to as "objective territoriality," where the primary effect of the infringing act on the forum state determines whether a court will assume jurisdiction, notwithstanding where the action takes place.[204]

Geist, in analysing the internet's jurisdictional crisis, argues that the application of the "passive versus active test"[205] propounded in the U.S. case of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[206] results in detrimental judicial decisions.[207] Further, attempts by the courts to break away from the *Zippo* test results in an equally problematic effect-based approach that potentially grants jurisdiction to every court everywhere.[208] In

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internet by a non resident defendant.

[203] Menthe, *ibid.*

[204] *Ibid.*

[205] This test is based on the nature and quality of the conduct on the internet. Thus, if a defendant enters into contracts with residents of foreign jurisdiction that involve knowing and repeated transmission of computer files over the internet, personal jurisdiction is proper. However, passive site on the internet that does little more than make information available to those who are interested in it is not grounds for exercise of personal jurisdiction non-resident owner operator of the site. In my view, this test is too subjective.

[206] 952 F. Supp. 1119 (W. D. Pa.. 1997), McLaughlin J. [hereinafter called *Zippo*].

[207] See for example, the *Yahoo*! Cases, *supra* note 201.

[208] See *Inset Systems Inc. v. Instructions Set Inc.*, 937 F. Supp. 161 (D. Conn. 1996), Covello J.; *Maritz Inc. v. CyberGold Inc.*, 947 F. Supp. 1328 (E. D. Mo. 1996), Webber J.; cf *Bensusan Restaurant Corp. v.*

arguing for a more effective standard to assert jurisdiction in cases involving predominantly internet-based contacts, Geist suggests a targeting-based analysis. Unlike the *Zippo* approach, a targeting analysis seeks to identify the intention of the parties and to assess the steps taken either to enter or to avoid a particular jurisdiction. He recommends the adoption of the core jurisdictional principle of foreseeability, which is founded on three factors – contracts, technology, and actual or implied knowledge.[209]

The recent Supreme Court of Canada's decision in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*[210] brings to the fore the jurisdictional difficulties respecting the liability of Internet Service Providers (ISPs) in the transmission of copyrighted works across different territorial borders. The Supreme Court rejected the Copyright Board's decision that no copyright liability attaches to ISPs unless the communication originates from a server located in Canada. The Court held that in order to assert jurisdiction over communications that have international participants, there must be a "real and substantial connection" to Canada. To this effect, the Court notes that the relevant factors to be taken into consideration would include "the *situs* of the content provider, the host server, the intermediaries and the end user."[211] In other words, each case should be determined on its own facts, and the weight

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King 937 F. Supp. 295 (S.D.N.Y. 1996), aff'd 126 F. 3d. 25 (2nd Cir. 1997), Stein J. From these cases we note the emergence of two lines of authorities. In one group of cases, courts are refusing to find only access to or creation of a Web site. Others, the courts take jurisdiction when there is significant interactivity, or securing subscribers or customers in the forum.

[209] Geist, *supra* note 202.

[210] [2004] SCC 45 (*SOCAN Case*), per Binnie J.

[211] *Ibid.* at para. 61 per Binnie J.

to given to any of the factors depends on the circumstances and the nature of the case. Lebel J., in his dissenting opinion, criticised the "real and substantial connection test" (endorsed by the majority) as likely to run contrary to the territoriality principle under copyright law. In his view, following that test could grant jurisdiction to every court in any internet related copyright dispute.[212] This will turn the courts into an octopus, stretching its tentacles here and there to grasp jurisdictions that are not meant for them.

It is instructive to note that none of the authorities discussed above suggests the adoption of jurisdictional rules that defy the long established principle of territoriality in copyright law. As a result of the difficulties surrounding the assertion of territorially-based jurisdictions, other commentators[213] advocate for the establishment of a special international court for online disputes arising from intellectual property infringements, or the introduction of international advisory and arbitration organisations that will assist national courts in dealing with them. The debate continues unabated.

2. CHOICE OF LAW RULES[214]

The internet also poses a great challenge to traditional conflict of law rules respecting copyright law. As previously mentioned, each state enforces its own copyright law. Thus, what prevails is the law of the protecting country, which could be the law of

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[212] *Ibid.* at para. 152.

[213] Athanasekou, *supra* note 194. See also J. P. Barlow, "Property and Speech: Who owns What you say in Cyberspace?" (1995) *Communications of the ACM,* 38 (2); Juliet M. Oberding and Terje Norderhaug, "A Separate Jurisdiction for Cyberspace?" Available at <http://www.ascusc.org/jcmc/vol2/issue1/juris.html> (last visited: 31/03/04).

[214] Also referred to as conflict of law rules or private international law.

the country in which the moral rights have been infringed. However, activities on the internet makes it extremely difficult, if not impossible, to identify which state's law should apply even if the most convenient forum to sue for the enforcement of moral right is determined. This is because infringements of moral rights online are perpetrated by persons in a virtual world that treats geographical borders with contempt. Therefore, in the unlikely event of the author detecting the infringer, the choice of law becomes difficult.

Today, if an author plans to sue some out-of-state defendant for moral right infringement, it should not be assumed that the forum court would automatically apply its geographically-based law. As Vu suggests, a lawyer litigating a copyright infringement case would do well to consider not just which forum the case should be pursued (jurisdiction), but also which state's law should apply (choice-of-law).[215] Goldstein is certainly correct to observe that "[t]he general choice of law rule for determining whether a copyright has been infringed is to apply the law of the country in which the unauthorised use occurred; if a lawsuit is filed in the United States for the unauthorised use in France of a work originating in Japan, the United States court will apply French law to determine whether the use infringes."[216] So far, courts in the U.S. concern themselves with the issue as to whether they have personal jurisdiction over the

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[215] Hao-Nhien Q. Vu, "Choose or Lose: Choice-of-Law Issues in Cyberspace Cases Remain Unresolved" (1997) May 22 Los Angeles Daily Journal, at 7, available at <http://kicon.com/nhien/choice.htm> (last accessed: 31/03/04)

[216] Goldstein, *ibid supra* note 196.

defendant.[217]

The *Yahoo*! type of cases[218] bring to the fore the choice-of-law challenge presented by the internet technology. In the *Yahoo*! case (France), an action was brought against Yahoo! Inc. for posting at its Web site an auction featuring Nazi memorabilia, which was accessible to French residents. This violated French law, although it was lawful under the U.S. law. The French Judge, Jean-Jacques Gomez, asserted jurisdiction and applied French law to order Yahoo! to ensure that French residents do not access the content on the site; failing which a daily fine of $13, 000 would be payable for non-compliance. Alarmed by the Court's order, Yahoo! proceeded to contest the validity of the French order in a California court. The U.S. District Court Judge Fogel declared the French order unenforceable in the U.S., because it violates Yahoo! Inc.'s First Amendment rights. Simply put, the French tribunal proposes, but the U.S. District Court disposes.

Both decisions strikingly exemplify conflict of law issues at the dawn of the cyberage. Two schools of thought have evolved to sustain the debate. One camp views cyberspace as transcending the sphere of traditional governmental power; accordingly, its regulation by states is ineffective and undesirable. The opposite camp emphasises that even virtual events and transactions have anchors in real space; thus cyberspace should be regulated by governments. The latter school appears to be dominant and reflected in

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[217] *Ibid.*

[218] *Yahoo! supra* note 201; thus referring to both France and U. S. decisions.

most governmental practices.[219] However, this dominant school of thought refuses to acknowledge that the internet renders obsolete our state-centred notions of applicable law. In my view, such a traditional approach exacerbates the difficulty in developing effective conflict of law rules in copyright litigation in the event of an online infringement.

The debate as to whether to develop special conflict of laws rules (like the jurisdictional rules discussed above) to regulate issues of infringements of the integrity of intellectual materials on the internet also does not move away from the applicability of the law of the protecting country. This can raise a whole array of difficult issues in the internet era. As will subsequently be argued, a more workable solution can be found in the adoption of international copyright principles.

3. ESTABLISHING COPYRIGHT INFRINGEMENT/EVIDENCE GATHERING

Having surmounted the otherwise difficult and fluid jurisdictional and choice-of-law quagmires facing the existing moral rights enforcement regime, the next daunting challenge confronting lawyer and client alike is how to amass evidence to substantiate the claim of moral rights infringement against the defendant under an adversarial system. It is instructive to note that litigation in copyright law is based on proof – with a plaintiff expected to prove its case on the balance of probabilities. In fact, the policing and enforcement of copyright, including moral rights, is generally the sole responsibility of the right holder, although the state may prosecute an offender when the work is pirated on

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[219] Mathias Reimann, "Introduction: The *Yahoo!* Case and Conflict of Laws in the Cyberage" (2003) Mich. J. Int'l L. 24(3) 663-696, at 664.

a commercial scale.[220] Therefore, when an author's moral right is infringed (and if the infringement is detected) in different foreign countries, which is common with the advent of the internet, the author must move from one country to another to assert its rights. This is unfavourable, and it quickly brings to the fore the limits of traditional copyright enforcement, which is geared towards finding infringers in possession of limited illegal hardcopy.

The internet has made information elusive.[221] Now that copyright materials in their electronic state have been freed from the constraints of paper, faceless infringers are able to alter them. The internet technology has made it possible for the average surfer to bypass copyright laws effortlessly and without detection.[222] Upon detection, the copyright owner may be left with no evidence to establish its case, since the technologies involved in digital piracy depart from the huge traditional machinery used in modifying a protected work into a totally different one. Accordingly, the lawyer and her client may have difficulty in securing evidence to establish the alleged infringement.

For instance, as Freedman observes, there are no reported Canadian cases discussing the circumstances in which a party will be granted access to an adverse party's computer systems for the purpose of discovering electronic records.[223] The situation is

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[220] See for example, Canadian *Copyright Act*, ss.42-43; Canadian *Criminal Code*, R.S.C. 1985, c. C-46, Parts VI & IX.

[221] Takach, *supra* note 175, at 677.

[222] Colangelo, *supra* note 170, at 892.

[223] Bradley J. Freedman, "Discovery of Electronic Records Under Canadian Law – A Practical Guide" (2004) 18(1) I.P.J. 59-81, at 66.

different in the US, where parties and their technical experts have been granted access to adverse parties' computer systems to search for relevant electronic records. In *Re: Ford Motor Company*, the US court held that to justify such an order, the applicant must establish a likelihood of retrieving relevant records and that there is no less intrusive manner of obtaining the information.[224] Any discovery of electronic records must address the relevant issues, such as the search for, location, retrieval, form of production and inspection, preservation, and use of trial information stored in personal computers or accessible online.[225]

4. CHALLENGES TO EXISTING REMEDIES[226]

Any author having an interest in a copyrighted work may institute a civil action for moral rights infringement. A civil remedy is aimed at "curing" the right holder for the loss suffered as a result of the infringement. A court may also grant a pre-emptive protection by preventing the infringement of the holder's copyright. These civil remedies include injunctions, damages, account of profits, and so forth. For example, the award of damages to the right holder depends on the nature of the infringement. Therefore, the plaintiff has to lead evidence to guide the court to make a just and proper order;[227] but the

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[224] Suit No. 03-10440 (US 11th Cir., 2003).

[225] *Manual for Complex Litigation*, 3d ed., Federal Judicial Centre, 1995, at 79.

[226] This section is not a discussion of the remedies available for copyright infringements. For such discussions, see Lesley Ellen Harris, *Canadian Copyright Law* 2nd ed. (Toronto, Montreal: McGraw-Hill Ryerson, 1995) Ch.13; Vaver, *supra* note 80, at Ch. 9.

[227] *Slumber-Magic Co. Ltd. v. Sleep-King Adjustable Bed Co.* (1985), 3 C.P.R. (3d) 81 (B.C.S.C.),

question is: Where is the evidence when the infringement occurs online? Should national courts use their discretion to award punitive damages because the moral rights infringement occurred online? This is obviously an indication of the difficulty presented by the internet technology to judges in awarding fair and just relief. The gloomy picture confronting judges in awarding damages is no different when it comes to ordering the infringer to account for profits associated with the infringement. The internet makes it difficult for the right holder to obtain receipts to prove the revenues derived from the infringement to establish a claim of profits as an alternative to damages, although the defendant may well have made profits from selling the infringing copies by the click of a mouse.

According to Aplin[228], in determining the appropriate relief to be granted when there is a moral rights infringement, the court may take into account any of the following factors:

> (i) whether the defendant was aware, or ought reasonably to have been aware, of the author's moral right,
>
> (ii) the extent of any damage to the work,
>
> (iii) the number, and categories, of people who have seen or heard the work,
>
> (iv) anything done by the defendant to mitigate the effects of the infringement,
>
> (v) if the moral right that was infringed was a right of attribution of authorship – any cost or difficulty associated with identifying the author, and/or

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McLachlin J. (as she then was).

[228] Tanya Aplin, "Internet Service Provider Liability for Moral Rights Infringement in Australia" (1998), available at <http://wwwlaw.murdoch.edu.au/dtlj/index.html> (last date accessed: 30/08/04).

(vi) any cost or difficulty in removing or reversing any false attribution of authorship, or derogatory treatment, of the work.

In addition, he notes that these factors may impact upon both the issue of liability and the extent of that liability.[229]

Moreover, there is always a danger that once a legal suit is commenced against an alleged infringer of copyright, the infringer will attempt to thwart the efforts of the copyright holder by destroying vital compromising evidence. Phillips, Durie and Karet capture this problem in these words: "The prevalence of piracy all over the world has led to recognition by the courts that the normal procedure whereby a copyright owner can seize infringing copies and equipment for making them only after proceedings have begun does not adequately protect his interests. What has been found to happen in practice is that as soon as a writ is served on an alleged infringer, the stock of infringing copies disappear together with the equipment used for making them."[230] Because of this, a pre-emptive relief in the nature of "Anton Piller order" was developed by the English Court of Appeal in the case of *Anton Piller KG v. Manufacturing Processes Ltd and Others*.[231] In this case, the plaintiffs made an *ex parte*[232] application to restrain the

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[229] *Ibid.*

[230] Phillips, Durie and Karet, *supra* note 24, at 99.

[231] [1976] 1 Ch. Div. 55, *per curiam*. Followed in the Canadian Federal Court of Appeal's decision in *Nintendo of America Inc. v. Coinex Video Games Inc.* (1982), 69 C. P. R. (2d) 122, per Heald J. It is instructive to note that Anton Pillar Order can be granted against infringers who have not been identified at the time of the granting of the order. Such Orders are called "rolling Anton Piller Orders" or "John Doe Orders." They are executed against such infringers as and when the applicant becomes

defendants, *inter alia*, from infringing their copyright and for an order to enter the defendants' premises to inspect documents and remove them. The Court in granting the application held that in most exceptional circumstances, it would grant an order for the applicant to take custody of vital materials in possession of the defendant which might be destroyed or disposed of to defeat the ends of justice.

This pre-trial relief proved quite effective in recovering documents and other tangible evidence prior to any court hearing. But now, the internet presents a unique challenge with the ephemeral nature of electronic data that are transmitted over the Net.

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aware of their existence. The case of *Nike Canada Ltd. v. Jane Doe* (2000), 1 C.P.R. (4th) 289 (F.C.T.D.), Reed J. at para. 4, sets out the distinction between Anton Pillar Orders and John Doe Orders: "There are two types of Anton Pillar Orders. In one the identity of the defendant or defendants (or at least of the main defendant or defendants) is known at the time the order is granted. There is evidence before the Court of particular acts of copyright...infringement, that it is alleged the defendants are committing. In the other type of Anton Piller Order, the identity of the defendant or defendants is not known at the time the order is granted; the proceeding is commenced against John and Jane Doe. Also, particulars of the alleged infringing activity of the as yet to be identified defendants are not known. A general statement is made in the affidavit filed to support the issuance of the Anton Pillar order that the plaintiff is suffering irreparable harm because of the manufacture and sale of counterfeit merchandise, that is, merchandise that infringes the plaintiff's copyright... The second type of Anton Piller orders is known as 'rolling' Anton Piller Order." For detailed discussion, see Daniel S. Drapeau and Jonathan J. Cullen, "Anton Piller Orders and the Federal Court of Canada: Everything the Practitioner Would Want to Know" (2004), 17(3) I.P.J. 301-499.

[232] Anton Piller Orders are obtained *ex parte* as a "...surprise, so that the defendant should not have advance knowledge of the application or the order and so have the opportunity of destroying or disposing of relevant materials or documents": *Indian Manufacturing Ltd. v. Lo* (1998), 75 C.P.R (3d) 338, at 342 (F.C.A.), per Stone J.A.

An alleged infringer, after pirating a digital copyrighted work, may use a self-styled code to secure it from detection, thereby rendering an Anton Piller order issued by a court a simple game of chess and pointless. Additionally, the state of anonymity with which online activities are conducted renders the traditional remedy of injunction ineffective. In my view, injunctive relief such as Anton Piller order must be given a new face to handle online moral rights infringement. Where a court decides to order a disclosure of the pirated materials, the judge should have discretion to specify special conditions attaching to the disclosure. These may involve appointing an expert to decode suspected encryptions and investigate the source of the internet service to ascertain deleted files.

E. CONCLUSION.

Since its inception as a distinct field of law, copyright has always battled to maintain that thin balance between the interest of creators – to receive reward for their creativity- and the interest of the public – to have reasonable access to works and ideas. Internet technology creates a challenge to the "bargaining approach" of allowing access to information while providing incentive to copyright holders by protecting their rights. The internet as a global medium has deconstructed geographical boundaries and made it virtually impossible to ascertain who is illegally "consuming" a copyright holder's work. Traditional concepts and principles relating to copyright law are falling apart. The centre cannot hold, and a legal quagmire confronts the legal community. Some suggest that the internet has rendered copyright concepts obsolete and that they should therefore be entirely scrapped.[233] I strongly dissent. Maybe those people have forgotten that the

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[233] See R. Varian, "Economic Issues Facing the Internet", in Institute for Information Studies, *The Internet as a Paradigm* (1997) 33; Ku, *supra* note 66.

internet is a new technology. Since the internet highlights the limitations in the current workings of copyright regimes, the search for answers must continue.

It has been cynically suggested by some commentators, but it is nonetheless true, that while book publishing provided the cradle for copyright, digital technologies -- and for that matter the internet -- have dug its grave. As will be pointed out below (Chapter Five), both national and international approaches to deal with the problems presented by the internet and confronting the legal community, so far have been unencouraging. The copyright world should be prepared to discard some long-established concepts, and pave the way for jurisdictional and choice of law issues to be tackled in an international treaty as the most realistic option now.

The next Chapter discusses international and national attempts to tackle the challenges confronting moral rights protection as a result of internet technology.

CHAPTER FIVE

RECENT INTERNATIONAL AND NATIONAL EFFORTS: DEFENCE BY ENCRYPTION TECHNOLOGY

A. INTRODUCTION

As an affirmation of the truism that copyright is increasingly driven by international concerns, the international community adopted the two WIPO Treaties on December 20, 1996 to stem the challenges presented by digital technology. The *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty* are two recent conventions that constitute important milestones in shaping, *inter alia*, moral rights protection regimes. However, recent international attempts have opened the floodgates for states to relinquish their traditional role of using legal measures to protect copyright owned by private bodies. The effect is an abandonment of the core justificatory legal framework of copyright to serve the whims of copyright capitalists, maximalists, and lobbyists.[234] As will be pointed below, a possible case scenario is the prevailing situation in the United States, where the *Digital Millennium Copyright Act* has become an instrument of "robbery" by copyright holders.

In an apparent response to the challenges presented by the internet to copyright, including moral rights, protection, attempts were made to strengthen the system. This culminated in the adoption of the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty*. Both treaties require member states to provide adequate legal protection against the circumvention of technological protection measures used by authors to secure their works from infringements. As will be shown below, the adoption

[234] These groups favour tight and strict copyright control over all uses of digital copyrighted works.

of both treaties in 1996 became the straw that broke the camel's back: the introduction of a robust system (via encryption) which excessively restricts fair use or dealing and other copyright privileges.

B. COMMENTS ON THE WIPO TREATIES

Recently, there has been worldwide concern over growing threats posed by the internet to digitised copyright works as a result of the illegal activities of pirates on the internet. There was a realisation that existing copyright regimes had become inadequate, and recent international efforts have gone towards attempting to strengthen the system, tightening copyright holders' control over electronic activity, adapting copyright rules to achieve that goal, and shrinking the scope of public domain.[235] The international approach endorsed an otherwise desperate move to permit copyright owners to use protective mechanism (encryptions) to protect copyright materials on the internet. As will be shown below, the approach has become problematic.

On December 20, 1996, the international community adopted two treaties to protect copyrighted information in digital forms – the WIPO Treaties. The *WIPO Copyright Treaty* came into force on March 6, 2002, after 30 states ratified it in accordance with its article 20. As of June 30, 2004, the number of states that have ratified the Treaty stood at 46, which included the United States but excluded Canada and the UK.[236] The *WIPO Performances and Phonograms Treaty* came into force on May 20, 2002, after 30 states ratified it in accordance with its article 29. As of June 30, 2004, a

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[235] Vaver, *supra* note 80, at 295.

[236] Available at <www.wipo.org/treaties/documents/english/pdf/s-wct.pdf> (last visited: 30/09/04).

total of 43 states had ratified it.

The WIPO Treaties have three main objectives:

- to confirm protection of traditional copyright materials and distribution mechanisms;
- to clarify how copyright and related rights apply in the electronic environment; and
- to protect against the hacking of technical protections applied to copyrighted products.[237]

The implication of the steps taken at the international level is to globalise encryption technology protection for copyright in light of the internet technology. This is apparent from both the objectives above and the preamble of the WIPO Treaties: "...to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible..."[238]

The relevant provisions for the purposes of our discussion can be found in Articles 11 and 12(1) of the *WIPO Copyright Treaty*, and Articles 18 and 19(1) of the *WIPO Performances and Phonograms Treaty*. The two relevant Articles of the *WIPO Copyright Treaty* are as follows:

> 11. Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restricts acts, in respect of their works, which are not authorised by the authors concerned or permitted by law.[239]
>
> 12(1). Contracting parties shall provide adequate and effective legal remedies

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[237] See <www.ifpi.org/site-content/library/wipo-treaties-introduction.pdf> (last visited: 30/09/04).

[238] In the wording of the *WIPO Performances and Phonograms Treaty*: "...to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible..."

[239] Article 18 of the *WIPO Performances and Phonograms Treaty* has identical wording with minor changes and omitting *Berne Convention*.

against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

> (i) to remove or alter any electronic rights management information without authority;
> (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic right management information has been removed or altered without authority.[240]

The provisions of the two WIPO Treaties provide a paradigm shift from the traditional approach of using legal measures to protect moral rights of authors on the internet, to the use of protective technology to control access to or use of copyright works and the dissemination of copies and phonorecords of copyrighted works. The new regime supports a degree of control over access to and use of copyrighted content that goes with the rights afforded by the existing copyright law. In effect, it gives legal recognition to a new regime of copyright enforcement based primarily upon technological protection of copyrighted works in addition to the old regime of legal sanctions for moral rights infringements.[241]

Nevertheless, the new approach, whereby authors, among other copyright holders, use encryption-based technology to protect copyright materials on the internet, is considered by Dratler as a gamble in both practical and political terms. First, he argues that the private sector may not be able to develop and maintain protective technology that

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[240] Article 19(1) of the *WIPO Performances and Phonograms Treaty* is substantially the same, but omitting reference to *Berne Convention*.

[241] Dratler, *supra* note 12, at 2-6.

can survive the determined assault of hackers on the internet worldwide.[242] Marks and Turnbull share a similar opinion that technology cannot protect copyright due to its fallibility; given time, hackers can always negate the copyright protection offered and render the international efforts a *brutum fulmen*.[243] Second, Dratler notes that the adoption and use of technological measures for protecting copyrighted works may obliterate uses that traditionally qualified as "fair" use or dealing.[244] Other commentators have also expressed concerns about the risk associated with shifting the focus of copyright enforcement from copying to copy-control technology, which threatens fair use or dealing as an established public policy of copyright.[245]

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[242] *Ibid.* at 2-8.

[243] D.S. Mark and B. H. Turnbull, "Technical Protection Measures: The Intersection of Technology, Law and Commercial Licenses" (2001) E. I. P. R. 198, at 201; See, e.g., *Universal City Studios Inc. v. Reimerdes* 111 F. Supp. 2d 294 (2000), Kaplan J., a case involving a Norwegian teenager, who was able to create a software program to circumvent the encryption measures used by motion picture studios to protect digital videos from unauthorised copyright.

[244] Dratler, *ibid.*

[245] See Dan L. Burk & Julie E. Cohen, "Fair Use Infrastructure for Rights Management Systems" (2001) Vol.15 Harv. J. L. & Tech. 41-83 at 51; Litman, *supra* note 9, at 30; Selena Kim, "The Reinforcement of International Copyright for the Digital Age" (2003) 16 I. P. J. 93-122 at 114-115; Brendan M. Schulman, "The Song Heard Round The World: The Copyright Implications of MP3s and the Future of Digital Music" (1998) 12 Harv. J. L. & Tech. 589-646.

As mentioned elsewhere, the result is that protective technology which allows copyright owners greater control will have the effect of excessively curtailing copyright exceptions, including fair use or dealing. Moreover, Gendreau views the use of encryption technology to secure online materials as reintroduction of the long abolished requirement of compliance with formalities before obtaining copyright protection.[246] Because if one regards such formalities (via the use of encryption) as evidence of the author's intention to benefit from copyright protection, that could result in an erroneous belief that non-encrypted works are not protected.[247] In other words, the use of encryption will become the universal condition and requirement for copyright, including moral rights, protection, and be viewed as a modern day substitute for formalities.

The international fortification of copyright in such a novel form will also grant moral rights protection to works, whose terms of protection have expired. Because if an author uses a self-styled code to secure her work, she can continue to prevent the public from having access to the work even after the statutory term of protection has expired. This will make nonsense of the legal foundation of copyright as a policy instrument designed to promote public interests.

One wishes not to be a prophet of doom, but the reality is that there will be an increase in illegal activities of those who will try to profit from the works of others by decoding the encrypted codes protecting copyrighted works, or by engaging in the business of providing devices or services to enable others to do so. I shall now proceed to point out the implications of the new protective approach in the United States for Canada

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[246] Gendreau, *supra* note 142, at 12.

[247] *Ibid.*

and the UK, which have yet to announce a legislative initiative to implement the WIPO Treaties.

C. NATIONAL EFFORTS IN THE UNITED STATES

The United States, in fulfilment of its international obligations under the WIPO Treaties, passed the *Digital Millennium Copyright Act*[248] in 1998 to protect, *inter alia*, moral rights in digital works transmitted over the internet. It facilitates the use of technological protections that restrict both initial access to and subsequent use of copyrighted digital material. As Litman puts it, "copyright is now seen as a tool for copyright owners to use to extract all the potential commercial value from works of authorship, even if that means that uses that have long been deemed legal are now brought within the copyright owners' control."[249] She further argues that the DMCA's exclusive focus on content owners, through its technological anti-circumvention measures and prohibition on digital copies, could potentially result in ownership control over every subsequent use of digital content, curtailing people's opportunities to purchase, read, view, hear, or use copyrighted works.[250]

Dratler expresses a similar concern: by giving the imprimatur of law to technical standards set by private bodies, the U.S. Congress risked allowing those private bodies to

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[248] *DMCA*, *supra* note 18. See Litman, *supra* note 9 [for the history of U.S. copyright law leading to the passage of the *DMCA*].

[249] Litman, *ibid.* at 14.

[250] *Ibid.* at 178.

hinder or halt the progress of technology for private ends.[251] He notes that the DMCA contains three distinct rules that provide legal reinforcement for technological measures protecting copyrighted works. The first prohibits circumventing technological measures that control access to a work. The second addresses countermeasures against access-control technology, while the third addresses countermeasures against technology that control specific uses of copyrighted works.[252] According to Dratler, it would be ironic if copyright law, traditionally designed to encourage progress in entertainment, publishing, and the arts, had the effect of holding back progress in the information technology that supports and advances all of these industries.[253] Further, the irony would be greater if copyright law degenerates into instruments for controlling the dissemination and substance of copyrighted content, thereby rendering illusory the promise of the internet as a tool of freedom.[254]

Although the DMCA is only five years old, it has spawned a variety of high-profile legal battles[255] and suffered intellectual assaults from many scholars.[256] Litman,

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[251] Dratler, *supra* note 12, at 1-30.

[252] *Ibid.* at 2-11.

[253] *Ibid.* at 1-31.

[254] *Ibid.*

[255] Such as: *Sony Computer Entertainment Inc. v. Connectix Corp.*, 203 F. 3d 596 (9th Cir. 2000), *per curiam*; *Universal City Studios Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (2000), 273 F.3d 429 (2nd Cir. 2000), Kaplan J.; *RealNetworks v. Streambox*, (2000) U. S. Dist. LEXIS 1889; *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir.2001), *per curiam*; *Los Angeles Times v. Free* Republic, 56

commenting on the DMCA, notes:

> [a]s I have watched the copyright wars intensify...it seemed to me that consumers' widespread noncompliance offers a very real ray of hope...I expect that most people will continue to ignore a law [DMCA] written in barely comprehensible prose that makes no sense whatsoever from their point of view...If a law is bad enough, even its proponents might be willing to abandon it in favour of a different law that seems more legitimate to the people it is intended to command.[257]

The implication is that it leaves copyright protection in the hands of private owners contrary to the aims of traditional legal protection of copyright. The great fear associated with the DMCA is that copyright holders may only adopt a selective method of publishing their works in a digital format and use codes to encrypt them, thereby denying the opportunity for fair use or dealing. For example, the public until recently has had and should continue to have the privilege to view and read other people's published works, in order to criticise them. However, encryption rights of authors, introduced by domestic legislation such as the DMCA produces a very stark result – complete denial of access and legitimate uses. It is to be hoped that the problems associated with the U.S. DMCA will not be repeated in Canada, or the UK when it comes to the implementation of the WIPO Treaties. In my view, Canada and the UK must thread cautiously in their legislative attitude to digital technology, in order not to succumb to the capitalist

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U.S.P.Q.2d 1862 (C.D. Cal.2000); *Microsystems Software Inc. v. Scandinavia Online AB*, 98 F. Supp. 2d 74 (D. Mass. 2000), Harrington J.

[256] See Dratler, *supra* note 12; Litman, *supra* note 9; Burk and Cohen, *supra* note 245; David V. Lampman, "A Prologue to a Farce or a Tragedy? A Paradox, a Potential Clash: Digital Pirates, The Digital Millennium Copyright Act, The First Amendment & Fair Use" (2003) Gon. L. Rev. 367-407.

[257] Litman, *ibid.* at 194-195.

machinery.

Flowing from the discussion, it is apparent that copyright now provides robust protection for digital materials through the use of encryption. The overreaction militates against traditional "copyright balance" of protecting both private and public interests. As Lessig notes, "[t]he opportunity cost, as economists would describe it, of this system of control is higher when, without this system of control, much more creative activity would go on."[258] For these reasons, it can be said that international attempts to tackle the problems presented by internet technology to moral rights protection have been erratic. The result is a system that over-rewards creators and at the same time stunts the efforts of later creators and obliterates long established public uses. In my view, there is no need to extend the reach of copyright protection so far that it criminalises innovation and discourages people from using a system of information sharing that aims to facilitate learning and creativity.

So far, I have argued that traditional copyright law fails to take moral rights seriously. Internet technology has dealt a further blow to this obscure aspect of copyright law. An attempt by the international community to address the problems has created a certain amount of turbulence. What is the way out? My suggestions in the next Chapter.

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[258] Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (NY: Random House Inc., 2001), at 216.

CHAPTER SIX

MY SUGGESTIONS: AN OPTION FOR REFORM

A. OBSERVATIONS

Since its inception as a distinct field of law, copyright has always battled to maintain that thin balance between the interest of creators – to receive reward for their creativity- and the interest of the public – to have reasonable access to works and ideas. Internet technology creates a challenge to the "bargaining approach" of allowing access to information while providing incentive to copyright holders by protecting their rights. The internet as a global medium has deconstructed geographical boundaries and made it virtually impossible to ascertain who is illegally "consuming" a copyright holder's work. Traditional concepts and principles relating to copyright law are falling apart. The centre cannot hold, and a legal quagmire confronts the legal community. International response to tackle those problems has further upset the "copyright balance", and threatened the public domain.

Some suggest that the internet has rendered copyright concepts obsolete and that they should therefore be entirely scrapped.[259] Ku notes that "[t]he creative destruction of copyright also raises questions about the constitutionality of efforts to preserve copyright in cyberspace if copyright's underlying justifications no longer exists. The expansion of copyright's monopoly into the new technologies of the internet when its underlying justification no longer exists would hardly be consistent..."[260] I strongly dissent. Maybe,

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[259] See Varian, *supra* note 233; Ku, *supra* note 66.

[260] Ku, *ibid.* at 323-324.

those people have forgotten that the internet is a new technology. Since the internet highlights the limitations in the current workings of copyright regimes, the search for answers must continue.

B. RECOMMENDATIONS

I. TAKING MORAL RIGHTS SERIOUSLY

Contrary to suggestions by some commentators[261] that there is no need for copyright (including moral rights) recognition in the digital era, it is my view that a timely recognition of moral rights of authors as basic human rights can partly assist in the search for their effective protection in the internet age. As state-recognised fundamental authorial rights, akin to traditional human rights, they should be incorporated into the mainstream worldwide education for their respect as part of fundamental human rights provisions. To this end, people should be educated to understand the importance of moral rights, internalise creative values, and integrate them into domestic legislation.[262] Such attitudinal consciousness and reshaping of moral rights protection in the internet age, which cuts across all national divides, could go a long way to assist in their effective enforcement.

As suggested elsewhere, the first major step that has to be undertaken in the quest for recognition of moral rights of authors as fundamental human rights (which is one of the core proposals of this paper) is to adopt an international harmonisation of authors' moral rights in a human right treaty (if what we have under the UN Declaration is not

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[261] See for example, Ku *ibid*; Lea, *supra* note 69.

[262] For detailed methodologies on how to ensure successful human rights education, see <http://www1.umn.edu/humanrts/edumat/> (last date accessed: 10/10/04).

convincing enough) such that all member states upon ratification have no option but to respect them as basic human rights. Next is their inclusion in national policies and human rights curriculum by member countries, and third, incorporating moral rights protection in domestic human rights legislation.

A positive understanding for recognition of moral rights as fundamental human rights can resurrect them from the traditional conundrums. It will further deal with the activities of pirates on the internet by inculcating a sense of worldwide respect in all people. This does not mean that hardened pirates will not continue their illegal activities, but these are unavoidable professional and technological hazards. The solution obviously should not be sought from encryption technology, because encrypting copyrighted works on the internet will grant more protection than required and will result in outlawing disencryption of copyrighted subject matter, without necessarily outlawing the encryption of uncopyrighted subject matter.[263] Adoption of such draconian measures for protecting moral rights on the internet will spark greater disobedience than obedience. For instance, the public has been advised against encryption protection instituted by the DMCA in the US as follows: "As I have watched the copyright wars intensify, however, it seems to me that consumers' widespread noncompliance offers a very real ray of hope...I expect that most people will continue to ignore a law written in barely comprehensible prose that makes no sense whatsoever from their point of view...If a law is bad enough, even its proponents might be willing to abandon it in favour of a different law that seem more

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[263] Paul Goldstein, "Copyright and its Substitutes" (1997) Wisconsin. L. Rev. 865-871, at 869.

legitimate to the people it is intended to command."[264]

Additionally, the types of moral rights that need protection in the internet age and the scope of their protection should be thoroughly debated in order not to stifle the wonderful opportunities that the internet presents. This will call for the cutting down of some traditionally recognised moral rights and the carving out of exceptions to the moral rights provisions. Further, the debate should consider the quest for maintaining a consistent lifespan for moral rights across the board. In my view, the moral rights of authors should subsist as long as the term of protection for the economic aspects remains. The term of protection for both rights appears to be too long[265], and I suggest that they should be made reasonable to promote the dissemination of ideas and information.

Lastly and perhaps most importantly, upon accepting moral rights as fundamental human rights of authors, the whole concept of waiver of moral rights becomes untenable. Because it cannot realistically co-exist with the protective regime that I am proposing, and must pave the way for a more workable situation. The concept of waiver substantially contradicts the claim that moral rights are personal rights of authors and should be recognised as fundamental human rights. My proposed protective regime requires the personality rights of authors to be considered more serious and less susceptible to compromise. Rather than diminishing moral rights protection afforded to all authors by allowing for waivers, the solution is to develop a flexible system that can

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[264] Litman, *supra* note 9, at 194-195.

[265] Lifespan of 50 years may be reasonable.

exclude certain works or authors from the protection of moral rights in the internet era.[266] In all these deliberations, the interest of the public must be fairly considered in order not to dislocate the social underpinning of copyright in striking a delicate balance between private and public interests.

As a result of the problems presented by the internet, merely recognising moral rights as human rights will not solve all the problems. There is also the need to institute a system that allows moral rights to be enforced both nationally and internationally to arrest the thorny legal issues of jurisdiction and choice of law challenges confronting modern copyright law. This matter is taking up in the next section.

II. ADOPTING INTERNATIONAL COPYRIGHT PRINCIPLES

In addition to other suggestions, I offer the following recommendations in an attempt to provide a few answers to many questions. First, the traditional notion of territorial enforcement of copyright must give way to a new paradigm that focuses on international copyright enforcement. This requires the enactment of rules that defy geographical limitations. There should also be an establishment of an international court or tribunal for online copyright, among other IP law, infringements that occur on a commercial and enormous scale. Alternatively, an international advisory body should be put in place to assist national courts in dealing with otherwise trivial, but troubling, copyright disputes. This could provide some answers to the unprecedented challenges presented by the internet, which has produced a counter-revolution of devastating power and effect respecting moral rights protection.

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[266] See Cee van Rij, "Moral Rights" in I.A.E.L (Netherlands, Belgium: MAKLU Publishers, 1995) 19-23, at 23.

As Athanasekou puts it, the "[n]ew international treaties should deal with the problem of effective protection of digital works in cyberspace and come up with mechanisms that will allow all problems, jurisdictional and technical alike, to be solved."[267] In his view, the jurisdictional and choice of law problems can be tackled on an international level either by creating a special international court for online intellectual property law disputes, or by introducing an international advisory and arbitration organisation that will assist national courts in dealing with them.[268] Rules relating to how such a court should conduct its proceedings must be thoroughly debated.

Currently, there exists a "Virtual Magistrate Pilot Project" of the Cyber Law Institute, comprising eight "magistrates" (with an in-depth knowledge of technical and legal matters) who conduct arbitration via electronic mail and publish its decisions on the institute's web site.[269] The mechanism involves a three-step process of (1) investigation, (2) decision, and possibly (3) litigation. Because of the problems associated with litigation, the third step is pursued as a last resort. This implies that "small claims" are unlikely to be pursued to step three. According to Post, the Virtual Magistrate Project has its weaknesses ranging from perceived bias to inadequate access to information as a

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[267] Athanasekou, *supra* note 194.

[268] *Ibid.*

[269] Information about the Virtual Magistrate project can be found on the Virtual Magistrate World Wide Web site, in particular the Virtual Magistrate Rules and Virtual Magistrate Frequently Asked Questions, available online at http://vmag.law.vill.edu:8080/, as well as the Cyberspace Law Institute Background Paper available online at www.cli.org.

result of budgetary constraints.[270] Also, the "magistrates" cannot award damages, although their decision can have injunctive effect.[271] In my view, an international copyright tribunal or advisory body modelled along the lines of the Virtual Magistrate Project with a clear mandate and legitimacy can assist in providing answers to some of the problem discussed in Chapter Four.

Second, some level of general accountability for the use of digital copyrighted materials that fall outside a permitted use must be put in place. Modern domestic copyright law could implement a royalty scheme to be made applicable to all devices capable of being used to pirate copyrighted materials on the internet.[272] Under section 82 of the Canadian *Copyright Act*, such a scheme exists, and it imposes a levy on every "blank audio recording medium" manufactured or imported into Canada. Similarly, section 1003 of the U.S. *Audio Home Recording Act*, 1992 imposes an obligation on manufacturers, distributors and importers of "any audio recording device or digital audio recording medium" to make royalty payments. If such a blanket royalty scheme is properly implemented to cover all devices that could be used to infringe digital copyrighted material, there would be no need to employ protective technological measures to deny the rights of the public, thereby stifling the free flow of information, technology, and commerce.

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[270] David G. Post, "Dispute Resolution in Cyberspace: Engineering A Virtual Magistrate System" available at http://www.temple.edu/lawschool/dpost/Vmaj.html#fn21 (last date accessed: 10/10/04).

[271] Athanasekou, *supra* note 194.

[272] See Colangelo, *supra* note 170, at 907-908.

C. CONCLUSION

In conclusion, while I acknowledge that the internet provides a golden opportunity for disseminating copyrighted works, it also represents a threat to and a possible source of demise of traditional moral rights protection and enforcement. The starting point of this essay is the thesis that moral rights of authors are more threatened than ever before by internet technology. Some conclude from it that we should forget about them; others call for a scheme of protection by seeking refuge in encryption technology. I disagree. There is therefore the urgent need to develop a forward-looking system of moral rights protection in the internet era which bridges the gap between economic and moral rights of authors, and also tackles the threats of the internet. That solution is to be found in, first, the general recognition of moral rights as fundamental human rights of authors. Second, the adoption of international copyright concepts to provide a more flexible and suitable legal framework for moral rights protection in the cyberage. The debate leading up to the adoption of such a treaty or legislation could consider some of the suggestions and recommendations made in this paper.

CHAPTER SEVEN

FINAL COMMENTS

A. CONCLUSION

Traditional copyright law is based on a social policy that strikes a delicate balance between a creator's control of original copyrighted works and society's interest in the free flow of ideas, information, and commerce. In an attempt to maintain this balance, the copyright system grants protection to the economic rights and moral rights of creators in return for benefit to the public from such creativity. My focus in this paper is on moral rights protection. I have shown that the law, as regards both rights, has been shaped by economic concerns and interests. Moral rights generally have less foothold in the common law world than in the civil law world. According to Goldstein, "[c]ivil law systems, with their ostensible deference to authors' natural rights, are commonly thought to provide more rigorous moral rights protection than common law systems, with their reputed utilitarian bent."[273] The lukewarm common law approach to moral rights reception has assigned them to complete oblivion. On the other hand, economic rights continue to dominate.

The world of copyright law is, in consequence, out of balance. To correct the imbalance, I have urged common law jurisdictions to make conscious efforts to resurrect moral rights protection from their esoteric and obscure place. Moral rights must be viewed, by their very nature, to be fundamental human rights. The only way, such "perceived abomination" can gain acceptance is to incorporate moral rights recognition in the worldwide human rights protection regime in order to ensure respect for creative

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[273] Goldstein, *supra* note 196, at 283-284.

endeavours while allowing reasonable and affordable access to copyright materials on the internet.

The internet has not only caused destruction to the social underpinnings of moral rights protection, but has also brought near chaos to the interpretation and enforcement of copyright law. The internet renders many traditional legal rules respecting moral rights protection somewhat ineffective. This paper raised some of the unique challenges and highlighted the extent to which copyright laws designed for the real world cannot adapt to the virtual world of the internet. The legal community is the immediate victim. The question is: What is the impact of those internet developments on the legal community?

Legal practitioners, judges and legal scholars, as the players of the legal community, are all used to printed-text study and practice of paper-oriented law, but now there is a transition to a digital text-based society. In the 21st century, a practising lawyer faces, *inter alia*, a jurisdictional and choice of law quagmire as a result of the way the internet has unsettled and continues to unsettle traditional copyright concepts. The discussions so far appear to shed some light on these new developments. In effect, a lawyer when faced with an online moral rights dispute has inconsistent principles with which to contend. The lawyer is required to get right answers to these questions in order to know where to proceed. Where did the activities resulting in the infringement take place? Where it was pirated, or where it was infringed, or in the dimension of cyberspace? Sheer uncertainty as to the most convenient and appropriate forum to seek redress for the client is the lawyer's dilemma.

Judges are confronted with the problem whether to entertain a moral rights dispute arising from the use of internet and the determination of the applicable law.

Additionally, there are currently on-going discussions worldwide to ascertain how traditional rules of procedure could be adopted to admit an electronic mail as evidence (which may also have a bearing on moral rights dispute) in a trial.[274] Following previous authoritative judicial decisions has been the practise of judges in common law countries. Therefore, the absence of such authoritative judicial pronouncements as precedents, concerning internet disputes, to settle the ongoing controversies, is also posing difficulties to judges and lawyers alike.

Legal writing in the area of copyright law becomes outdated as new statutes are passed and ground-breaking court decisions are delivered. This necessitates the need to ensure constant revision of published copyright books by authors. However, this occupational hazard of legal writers has, in the field of copyright law, become extremely acute with the advent of the internet technology. New publications are flying all over the globe in the attempt to discuss copyright principles in the face of the internet technology. Some, arguably, even question the utility of a book in the internet era. Legal scholars are overwhelmed by the inconsistent principles evolving in copyright law to regulate online disputes. The only important service a copyright scholar can offer is to state the law as at the time of writing and to leave future debates, and the application of traditional copyright concepts to online disputes, to time. A common lamentation is articulated by Litman,[275] who in the last Chapter of her book begins with the sentence: "As of this writing, the future is murky." Of course, writing a book on such a volatile topic is

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[274] Jonathan B. Ealy & Aaron M. Schutt, "What – If Anything – Is An E-Mail? Applying Alaska's Civil Discovery Rules To E-mail Production" (2002) 19 Alaska L. Rev. 119.

[275] Litman, *supra* note 9, at Ch.13.

difficult, and Litman cannot be faulted because she cannot predict the future of digital copyright – no one else knows either.[276]

Sooner than later, students reared almost entirely on digital information will be arriving in our law schools. These 21st century law students may present significant challenge to legal education, since they may learn differently from their professors, who learned primarily from printed text.[277] A professor, who is teaching copyright law (like any other subject), must therefore be abreast with prevailing developments on the internet to enhance teaching and research, and avoid embarrassment. As Takach notes: "Of course, there will be new technical and legal developments – in [internet] law fields, they are a daily occurrence. It is, however, precisely the daily avalanche of new legal precedents and conundrums that make it necessary to stand back and take stock from time to time. Canadian scholars [like any other copyright scholar] can be forgiven for sometimes *feeling overwhelmed at the daunting task of staying current with new developments*."[278]

The legal community embarked on a search for answers to stem the digital threat,

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[276] See Karen Coyle, "Review of Litman's Digital Copyright Book" (2001) Inf. Tech. & Lib. 220, available at <http://www.kcoyle.net/litman.html> (last accessed: 31/03/2004).

[277] Rogelio Lasso, "From the Paper Chase To the Digital Chase: Technology of Teaching 21st Century Law Students" (2002) 43 San. C. L. Rev. 1. At p.20, he provides a survey of entering law students at Washburn University School of Law: by 2000, all but one of his tort students owned a computer and navigated the internet. In 2001, 95% of entering students at DePaul owned a computer, and nearly all of them used the internet.

[278] Takach, *supra* note 175, at xxxiv (emphasis added).

but the response was an overreaction. This has resulted in the introduction of a revolutionary robust layer of protection for online copyright materials to serve the interest of few capitalists. In today's digitally networked environment, the traditional copyright balance has further shifted dramatically to one side, as copyright holders can impose draconian terms and conditions on access to and use of works, far beyond the bounds set by copyright law. By monitoring and restricting what people look at, listen to, read, and hear (via encryption technology), the law makes nonsense of the public interest benefits of copyright system. As a result, the traditional "rights to insure respect for intellectual creativity and prevent copying (as conferred under copyright) have been replaced by a "right to prevent access to and use" of works. The resulting impact on the free flow of ideas and information, as the bedrock of creativity and development, is evident. Proponents of anti-circumvention provisions argue that they are necessary to prevent copyright, including moral rights, infringement. However, such claim loses sight of the fact that infringers can be punished under the existing copyright regime.

Instead of seeking solution from encryption-based technology, we should rather discard some of these traditional copyright concepts and principles in order to pave the way for more globally enforceable copyright norms. Countries must begin to accept the need to foster the extraterritorial application of copyright rules to tackle the widespread disregard for copyright laws. This gives credence to the urgent call for the adoption of international copyright concepts and principles to tackle challenges in relation to jurisdiction, choice of law, and enforcement of copyright disputes.

Many recommendations have been made under various chapters of this paper with the sole aim of contributing and sparking further debate. It remains to emphasise that,

whilst it may have been possible at a point in time for national copyright laws to operate in isolation from other national laws, the advent of internet technology, which recognises no national boundaries, necessitates the adoption of international copyright concepts to stem the onslaught of the internet. Such approach could settle some of the raging controversies. I shall conclude by echoing these remarks: "It is difficult for [copyright] laws to keep pace with technology...when technology gets too far ahead of the law, and it becomes difficult and awkward to adapt the specific statutory provisions to comport with the law's principles, it is time for re-evaluation and change."[279] The debates leading up to the re-evaluation, and changing the traditional copyright paradigm could consider some of the suggestions and recommendations made in this paper.

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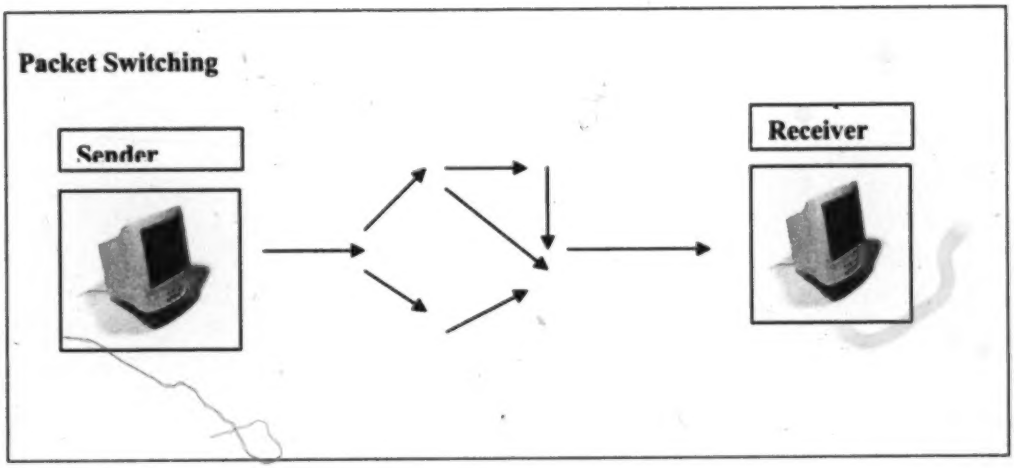
[279] National Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure*, Report of the Working Group on Intellectual Property Rights (Washington, D.C., September, 1995), at 211.


Packet Switching
Sender
Receiver

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APPENDIX I

PARTICULARS	*BERNE CONVENTION*	CANADA *COPYRIGHT ACT*, 1985	THE US *COPYRIGHT ACT*, 1976	THE UK *COPYRIGHT, DESIGNS AND PATENTS ACT*, 1988
▪ **Recognition of moral rights**	The *Berne Convention* obliges contracting states to provide for the protection of both the paternity right and the integrity right of authors: Article 6*bis* para. 1.	Protection is granted to the paternity right, the right of association and the integrity right of authors: section 14.1(1).	Protection is granted to the rights of attribution, paternity and integrity of only artists: section 106A.	Protection is granted to four rights: paternity, integrity, false attribution and disclosure: sections 77(1), 80(1), 84(1) and 85(1) respectively.
▪ **Protection of paternity right**	No formal requirement: Article 5 para. 2.	Protected under section 14.1(1) for the life of the author plus fifty years thereafter: sections 6 & 14.2(1). No formal requirement	Artistic work must be signed and consecutively numbered if the work is more than one copy and not more than two hundred copies before paternity right	Protected under section 77(1) for the life of the author plus 50 years thereafter: Section 86(1). Required to be asserted by notice before

		imposed.	becomes effective: section 101 & 106A(1)(a). For the works created before 1990: life plus fifty years thereafter: section 106(d)(2). For the works created after 1990, life of the author only: section 106A(d)(1).	it can be enforced: section 78.
▪ **Protection of integrity right**	No formal requirement: Article 5 para. 2.	Protected under section 14.1(1) for the life of the author plus fifty years thereafter: sections 6 & 14.2(1). No formal requirement imposed.	Artistic work must be signed and consecutively numbered if the work is more than one copy and not more than two hundred copies before integrity right becomes effective: section 101 & 106A(2).	Protected under section 80(1) for the life of the author plus 50 years thereafter: Section 86(1). No formal requirement imposed.
▪ **Protection of the right of association**	No	Recognised under section 14.1(1) for the life of the author plus fifty years thereafter: sections 6 & 14.2(1). No formal requirement	Not recognised.	Not recognised.

		imposed		
▪ **Protection against false attribution**	No	Not recognised as a moral right.	Artistic work must be signed and consecutively numbered if the work is more than one copy and not more than two hundred copies before attribution right becomes effective: section 101 & 106A(1)(b)	Protected under section 84 for the life of author plus twenty years thereafter: section 86(2). No formal requirement imposed.
▪ **Protection of the right of disclosure**	No	Not recognised as a moral right. It is protected as an economic right under section 3(1).	Not recognised as a moral right	Protected under section 85 for the life of the author plus 50 years thereafter: Section 86(1). No formal requirement imposed.
▪ **Limitation of protection to numbers of copies**	No	No	No	No
▪ **Similarities and differences between the statutes**	N/A	Moral rights protection is granted to an author of every literary, artistic, dramatic and musical work. An author can use a	Moral rights protection is granted to the author of a visual art-work: section 106A. There is no mention of the right to	Moral rights protection is granted to an author of every literary, artistic, dramatic and musical works, and the director of a copyright film:

		pseudonym or remain anonymous: section 14.1(1). Moral rights cannot be assigned, but can be waived: section 14.1(2).	remain anonymous nor of the right to use a pseudonym. Moral rights can be waived. In the case of joint work, one author's waiver binds her co-author: section 106A(e)(1).	chapter iv. An author can use a pseudonym: section 77(8). But there is no mention of the right to remain anonymous, because of the requirement of assertion in section 78. Moral rights cannot be assigned, but can be waived: section 87(2)-(4).

APPENDIX II

Copyright, Designs and Patents Act 1988 (c. 48)

1988 c. 48

Chapter IV

Moral Rights

Right to be identified as author or director

Right to be identified as author or director.

77.—(1) The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work in the circumstances mentioned in this section; but the right is not infringed unless it has been asserted in accordance with section 78.

(2) The author of a literary work (other than words intended to be sung or spoken with music) or a dramatic work has the right to be identified whenever—

(a) the work is published commercially, performed in public, broadcast or included in a cable programme service; or

(b) copies of a film or sound recording including the work are issued to the public;

and that right includes the right to be identified whenever any of those events occur in relation to an adaptation of the work as the author of the work from which the adaptation was made.

(3) The author of a musical work, or a literary work consisting of words intended to be sung or spoken with music, has the right to be identified whenever—

(a) the work is published commercially;

(b) copies of a sound recording of the work are issued to the public; or

(c) a film of which the sound-track includes the work is shown in public or copies of such a film are issued to the public;

and that right includes the right to be identified whenever any of those events occur in relation to an adaptation of the work as the author of the work from which the adaptation was made.

(4) The author of an artistic work has the right to be identified whenever—

(a) the work is published commercially or exhibited in public, or a visual image of it is broadcast or included in a cable programme service;

(b) a film including a visual image of the work is shown in public or copies of such a film are issued to the public; or

(c) in the case of a work of architecture in the form of a building or a model for a building, a sculpture or a work of artistic craftsmanship, copies of a graphic work representing it, or of a photograph of it, are issued to the public.

(5) The author of a work of architecture in the form of a building also has the right to be identified on the building as constructed or, where more than one building is constructed to the design, on the first to be constructed.

(6) The director of a film has the right to be identified whenever the film is shown in public, broadcast or included in a cable programme service or copies of the film are issued to the public.

(7) The right of the author or director under this section is—

(a) in the case of commercial publication or the issue to the public of copies of a film or sound recording, to be identified in or on each copy or, if that is not appropriate, in some other manner likely to bring his identity to the notice of a person acquiring a copy,

(b) in the case of identification on a building, to be identified by appropriate means visible to persons entering or approaching the building, and

(c) in any other case, to be identified in a manner likely to bring his identity to the attention of a person seeing or hearing the performance, exhibition, showing, broadcast or cable programme in question;

and the identification must in each case be clear and reasonably prominent.

(8) If the author or director in asserting his right to be identified specifies a pseudonym, initials or some other particular form of identification, that form shall be used; otherwise any reasonable form of identification may be used.

(9) This section has effect subject to section 79 (exceptions to right).

Requirement that

78.—(1) A person does not infringe the right conferred by

right be asserted.

section 77 (right to be identified as author or director) by doing any of the acts mentioned in that section unless the right has been asserted in accordance with the following provisions so as to bind him in relation to that act.

(2) The right may be asserted generally, or in relation to any specified act or description of acts—

(a) on an assignment of copyright in the work, by including in the instrument effecting the assignment a statement that the author or director asserts in relation to that work his right to be identified, or

(b) by instrument in writing signed by the author or director.

(3) The right may also be asserted in relation to the public exhibition of an artistic work—

(a) by securing that when the author or other first owner of copyright parts with possession of the original, or of a copy made by him or under his direction or control, the author is identified on the original or copy, or on a frame, mount or other thing to which it is attached, or

(b) by including in a licence by which the author or other first owner of copyright authorises the making of copies of the work a statement signed by or on behalf of the person granting the licence that the author asserts his right to be identified in the event of the public exhibition of a copy made in pursuance of the licence.

(4) The persons bound by an assertion of the right under subsection (2) or (3) are—

(a) in the case of an assertion under subsection (2)(a), the assignee and anyone claiming through him, whether or not he has notice of the assertion;

(b) in the case of an assertion under subsection (2)(b), anyone to whose notice the assertion is brought;

(c) in the case of an assertion under subsection (3)(a), anyone into whose hands that original or copy comes, whether or not the identification is still present or visible;

(d) in the case of an assertion under subsection (3)(b), the licensee and anyone into whose hands a copy made in pursuance of the licence comes, whether or not he has notice of the assertion.

(5) In an action for infringement of the right the court shall, in considering remedies, take into account any delay in asserting the right.

Exceptions to right.

79.—(1) The right conferred by section 77 (right to be identified as author or director) is subject to the following

exceptions.

(2) The right does not apply in relation to the following descriptions of work—

(a) a computer program;

(b) the design of a typeface;

(c) any computer-generated work.

(3) The right does not apply to anything done by or with the authority of the copyright owner where copyright in the work originally vested—

(a) in the author's employer by virtue of section 11(2) (works produced in course of employment), or

(b) in the director's employer by virtue of section 9(2)(a) (person to be treated as author of film).

(4) The right is not infringed by an act which by virtue of any of the following provisions would not infringe copyright in the work—

(a) section 30 (fair dealing for certain purposes), so far as it relates to the reporting of current events by means of a sound recording, film, broadcast or cable programme;

(b) section 31 (incidental inclusion of work in an artistic work, sound recording, film, broadcast or cable programme);

(c) section 32(3) (examination questions);

(d) section 45 (parliamentary and judicial proceedings);

(e) section 46(1) or (2) (Royal Commissions and statutory inquiries);

(f) section 51 (use of design documents and models);

(g) section 52 (effect of exploitation of design derived from artistic work);

(h) section 57 (anonymous or pseudonymous works: acts permitted on assumptions as to expiry of copyright or death of author).

(5) The right does not apply in relation to any work made for the purpose of reporting current events.

(6) The right does not apply in relation to the publication in—

(a) a newspaper, magazine or similar periodical, or

(b) an encyclopaedia, dictionary, yearbook or other collective work of reference,

of a literary, dramatic, musical or artistic work made for the purposes of such publication or made available with the consent of the author for the purposes of such publication.

(7) The right does not apply in relation to—

(a) a work in which Crown copyright or Parliamentary

copyright subsists, or

(b) a work in which copyright originally vested in an international organisation by virtue of section 168,

unless the author or director has previously been identified as such in or on published copies of the work.

Right to object to derogatory treatment of work

Right to object to derogatory treatment of work.

80.—(1) The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right in the circumstances mentioned in this section not to have his work subjected to derogatory treatment.

(2) For the purposes of this section—

(a) "treatment" of a work means any addition to, deletion from or alteration to or adaptation of the work, other than—

(i) a translation of a literary or dramatic work, or

(ii) an arrangement or transcription of a musical work involving no more than a change of key or register; and

(b) the treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director;

and in the following provisions of this section references to a derogatory treatment of a work shall be construed accordingly.

(3) In the case of a literary, dramatic or musical work the right is infringed by a person who—

(a) publishes commercially, performs in public, broadcasts or includes in a cable programme service a derogatory treatment of the work; or

(b) issues to the public copies of a film or sound recording of, or including, a derogatory treatment of the work.

(4) In the case of an artistic work the right is infringed by a person who—

(a) publishes commercially or exhibits in public a derogatory treatment of the work, or broadcasts or includes in a cable programme service a visual image of a derogatory treatment of the work,

(b) shows in public a film including a visual image of a derogatory treatment of the work or issues to the public copies of such a film, or

(c) in the case of—

(i) a work of architecture in the form of a model for

a building,

(ii) a sculpture, or

(iii) a work of artistic craftsmanship,

issues to the public copies of a graphic work representing, or of a photograph of, a derogatory treatment of the work.

(5) Subsection (4) does not apply to a work of architecture in the form of a building; but where the author of such a work is identified on the building and it is the subject of derogatory treatment he has the right to require the identification to be removed.

(6) In the case of a film, the right is infringed by a person who—

(a) shows in public, broadcasts or includes in a cable programme service a derogatory treatment of the film; or

(b) issues to the public copies of a derogatory treatment of the film,

or who, along with the film, plays in public, broadcasts or includes in a cable programme service, or issues to the public copies of, a derogatory treatment of the film sound-track.

(7) The right conferred by this section extends to the treatment of parts of a work resulting from a previous treatment by a person other than the author or director, if those parts are attributed to, or are likely to be regarded as the work of, the author or director.

(8) This section has effect subject to sections 81 and 82 (exceptions to and qualifications of right).

Exceptions to right.

81.—(1) The right conferred by section 80 (right to object to derogatory treatment of work) is subject to the following exceptions.

(2) The right does not apply to a computer program or to any computer-generated work.

(3) The right does not apply in relation to any work made for the purpose of reporting current events.

(4) The right does not apply in relation to the publication in—

(a) a newspaper, magazine or similar periodical, or

(b) an encyclopaedia, dictionary, yearbook or other collective work of reference,

of a literary, dramatic, musical or artistic work made for the purposes of such publication or made available with the consent of the author for the purposes of such publication.

Nor does the right apply in relation to any subsequent exploitation elsewhere of such a work without any modification of the published version.

(5) The right is not infringed by an act which by virtue of section 57 (anonymous or pseudonymous works: acts permitted on assumptions as to expiry of copyright or death of author) would not infringe copyright.

(6) The right is not infringed by anything done for the purpose of—

(a) avoiding the commission of an offence,

(b) complying with a duty imposed by or under an enactment, or

(c) in the case of the British Broadcasting Corporation, avoiding the inclusion in a programme broadcast by them of anything which offends against good taste or decency or which is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling,

provided, where the author or director is identified at the time of the relevant act or has previously been identified in or on published copies of the work, that there is a sufficient disclaimer.

Qualification of right in certain cases.

82.—(1) This section applies to—

(a) works in which copyright originally vested in the author's employer by virtue of section 11(2) (works produced in course of employment) or in the director's employer by virtue of section 9(2)(a) (person to be treated as author of film),

(b) works in which Crown copyright or Parliamentary copyright subsists, and

(c) works in which copyright originally vested in an international organisation by virtue of section 168.

(2) The right conferred by section 80 (right to object to derogatory treatment of work) does not apply to anything done in relation to such a work by or with the authority of the copyright owner unless the author or director—

(a) is identified at the time of the relevant act, or

(b) has previously been identified in or on published copies of the work;

and where in such a case the right does apply, it is not infringed if there is a sufficient disclaimer.

Infringement of right by possessing

83.—(1) The right conferred by section 80 (right to object to

or dealing with infringing article.

derogatory treatment of work) is also infringed by a person who—

(a) possesses in the course of a business, or

(b) sells or lets for hire, or offers or exposes for sale or hire, or

(c) in the course of a business exhibits in public or distributes, or

(d) distributes otherwise than in the course of a business so as to affect prejudicially the honour or reputation of the author or director,

an article which is, and which he knows or has reason to believe is, an infringing article.

(2) An "infringing article" means a work or a copy of a work which—

(a) has been subjected to derogatory treatment within the meaning of section 80, and

(b) has been or is likely to be the subject of any of the acts mentioned in that section in circumstances infringing that right.

False attribution of work

False attribution of work.

84.—(1) A person has the right in the circumstances mentioned in this section—

(a) not to have a literary, dramatic, musical or artistic work falsely attributed to him as author, and

(b) not to have a film falsely attributed to him as director;

and in this section an "attribution", in relation to such a work, means a statement (express or implied) as to who is the author or director.

(2) The right is infringed by a person who—

(a) issues to the public copies of a work of any of those descriptions in or on which there is a false attribution, or

(b) exhibits in public an artistic work, or a copy of an artistic work, in or on which there is a false attribution.

(3) The right is also infringed by a person who—

(a) in the case of a literary, dramatic or musical work, performs the work in public, broadcasts it or includes it in a cable programme service as being the work of a person, or

(b) in the case of a film, shows it in public, broadcasts it or includes it in a cable programme service as being directed by a person,

knowing or having reason to believe that the attribution is false.

(4) The right is also infringed by the issue to the public or public display of material containing a false attribution in connection with any of the acts mentioned in subsection (2) or (3).

(5) The right is also infringed by a person who in the course of a business—

(a) possesses or deals with a copy of a work of any of the descriptions mentioned in subsection (1) in or on which there is a false attribution, or

(b) in the case of an artistic work, possesses or deals with the work itself when there is a false attribution in or on it,

knowing or having reason to believe that there is such an attribution and that it is false.

(6) In the case of an artistic work the right is also infringed by a person who in the course of a business—

(a) deals with a work which has been altered after the author parted with possession of it as being the unaltered work of the author, or

(b) deals with a copy of such a work as being a copy of the unaltered work of the author,

knowing or having reason to believe that that is not the case.

(7) References in this section to dealing are to selling or letting for hire, offering or exposing for sale or hire, exhibiting in public, or distributing.

(8) This section applies where, contrary to the fact—

(a) a literary, dramatic or musical work is falsely represented as being an adaptation of the work of a person, or

(b) a copy of an artistic work is falsely represented as being a copy made by the author of the artistic work,

as it applies where the work is falsely attributed to a person as author.

Right to privacy of certain photographs and films

Right to privacy of certain photographs and films.

85.—(1) A person who for private and domestic purposes commissions the taking of a photograph or the making of a film has, where copyright subsists in the resulting work, the right not to have-

(a) copies of the work issued to the public,

(b) the work exhibited or shown in public, or

(c) the work broadcast or included in a cable programme

service;

and, except as mentioned in subsection (2), a person who does or authorises the doing of any of those acts infringes that right.

(2) The right is not infringed by an act which by virtue of any of the following provisions would not infringe copyright in the work—

(a) section 31 (incidental inclusion of work in an artistic work, film, broadcast or cable programme);

(b) section 45 (parliamentary and judicial proceedings);

(c) section 46 (Royal Commissions and statutory inquiries);

(d) section 50 (acts done under statutory authority);

(e) section 57 (anonymous or pseudonymous works: acts permitted on assumptions as to expiry of copyright or death of author).

Supplementary

Duration of rights.

86.—(1) The rights conferred by section 77 (right to be identified as author or director), section 80 (right to object to derogatory treatment of work) and section 85 (right to privacy of certain photographs and films) continue to subsist so long as copyright subsists in the work.

(2) The right conferred by section 84 (false attribution) continues to subsist until 20 years after a person's death.

Consent and waiver of rights.

87.—(1) It is not an infringement of any of the rights conferred by this Chapter to do any act to which the person entitled to the right has consented.

(2) Any of those rights may be waived by instrument in writing signed by the person giving up the right.

(3) A waiver—

(a) may relate to a specific work, to works of a specified description or to works generally, and may relate to existing or future works, and

(b) may be conditional or unconditional and may be expressed to be subject to revocation;

and if made in favour of the owner or prospective owner of the copyright in the work or works to which it relates, it shall be presumed to extend to his licensees and successors in title unless a contrary intention is expressed.

(4) Nothing in this Chapter shall be construed as excluding the operation of the general law of contract or estoppel in relation to an informal waiver or other transaction in relation to any of the rights mentioned in subsection (1).

Application of provisions to joint works.

88.—(1) The right conferred by section 77 (right to be identified as author or director) is, in the case of a work of joint authorship, a right of each joint author to be identified as a joint author and must be asserted in accordance with section 78 by each joint author in relation to himself.

(2) The right conferred by section 80 (right to object to derogatory treatment of work) is, in the case of a work of joint authorship, a right of each joint author and his right is satisfied if he consents to the treatment in question.

(3) A waiver under section 87 of those rights by one joint author does not affect the rights of the other joint authors.

(4) The right conferred by section 84 (false attribution) is infringed, in the circumstances mentioned in that section—

(a) by any false statement as to the authorship of a work of joint authorship, and

(b) by the false attribution of joint authorship in relation to a work of sole authorship;

and such a false attribution infringes the right of every person to whom authorship of any description is, whether rightly or wrongly, attributed.

(5) The above provisions also apply (with any necessary adaptations) in relation to a film which was, or is alleged to have been, jointly directed, as they apply to a work which is, or is alleged to be, a work of joint authorship.

A film is "jointly directed" if it is made by the collaboration of two or more directors and the contribution of each director is not distinct from that of the other director or directors.

(6) The right conferred by section 85 (right to privacy of certain photographs and films) is, in the case of a work made in pursuance of a joint commission, a right of each person who commissioned the making of the work, so that—

(a) the right of each is satisfied if he consents to the act in question, and

(b) a waiver under section 87 by one of them does not affect the rights of the others.

Application of provisions to parts of works.

89.—(1) The rights conferred by section 77 (right to be identified as author or director) and section 85 (right to privacy of certain photographs and films) apply in relation to the whole or any substantial part of a work.

(2) The rights conferred by section 80 (right to object to derogatory treatment of work) and section 84 (false attribution) apply in relation to the whole or any part of a work.